FILED
SEP 26 196
JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 220

ATLANTIC COAST LINE RAILROAD COMPANY, JACKSONVILLE TERMINAL COMPANY, and SEABOARD AIR LINE RAILROAD COMPANY, *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOWELL KENNEDY, T. C. BOLAND, and J. E. EASON, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

Of Counsel:
SCHOENE & KRAMER
Washington, D. C.

RUTLEDGE & MILLEDGE
Miami, Florida

BECKHAM & MCALILEY
Miami, Florida

LESTER P. SCHOENE
1625 K Street, N.W.
Washington, D. C.

NEAL RUTLEDGE
ALLAN MILLEDGE
RICHARD L. HORN
601 Flagler Federal Bldg.
111 N.E. First Street
Miami, Florida 33132

THOMAS W. MCALILEY
1010 Concord Building
63 West Flagler Street
Miami, Florida 33130

Attorneys for Respondents

September, 1966.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	4
Introduction	4
Background of FEC Strikes	9
FEC-Jacksonville Terminal Operations	11
The Picketing	19
The Reserved Gate	23
SUMMARY OF ARGUMENT	24
ARGUMENT	27
I. The Norris-LaGuardia Act, by Its Own Terms, by Long Standing Interpretation of This Court, and Read Either in Connection with or Apart from the Railway Labor Act, Precludes Federal Court Jurisdiction To Enter the Labor Injunction Here Involved	27
II. Petitioners' Suggested "Accommodation" of the Norris-LaGuardia Act to the Railway Labor Act Is Without Foundation in the Language or Spirit of Either Statute	47
III. The District Court Lacked Jurisdiction Because the Conduct Enjoined Is Arguably Subject to the Exclusive Primary Jurisdiction of the National Labor Relations Board	57
IV. Respondents' Conduct Herein Is Outlawed by No Federal Statute and Is Expressly Legalized by Section 20 of the Clayton Act	62
A. Clayton Act Applicable to Respondents' Activity	62
B. Respondents' Activity Not Prohibited Even Under NLRB Standards	63

Page

C. Respondents' Activity Not Violative of Interstate Commerce Act 68

CONCLUSION 71

CITATIONS

CASES:

Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees v. Dixie Motor Coach Corp., 170 F. 2d 902 (8 Cir., 1948) 44, 51

Amalgamated Clothing Workers v. Richman Brothers, 348 U.S. 511 (1955) 59

American Federation of Labor v. Swing, 312 U.S. 321 (1941) 56

American Steel Foundries v. Tri-City Central Trades, 257 U.S. 184 (1921) 36

Bakery Sales Drivers' Union v. Wagshal, 333 U.S. 437 (1948) 40

Bedford Cut Stone Company v. Journeyman Stone Cutters' Ass'n. of North America, 274 U.S. 37 (1927) 36

Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co., 372 U.S. 284 (1963) 25, 30, 48, 49

Brotherhood of Locomotive Engineers v. Louisville & N.R. Co., 373 U.S. 33 (1963) 49

Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen and Phelps Dodge Corp., 130 NLRB No. 94, 47 LRRM 1461 (1961) 60

Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast Railway Company, 346 F. 2d 673 (5 Cir., 1965) 7, 10, 31, 44, 50

Brotherhood of R.R. Trainmen v. Chicago R. and I.R. Co., 353 U.S. 30 (1957) 25, 47, 49

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952) 26, 48

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., No. 244, O.T. 1966 ..... 26, 57

Brotherhood of Railroad Trainmen v. New York Central R. Co., 246 F. 2d 114 (6 Cir., 1957), *cert. denied*, 355 U.S. 877 (1957) 51

Page

Brotherhood of Railroad Trainmen v. Toledo, P. and W.R. Co., 321 U.S. 50 (1944) 25, 50, 55
Brotherhood of Railway Clerks v. Florida East Coast Ry. Co., 384 U.S. 238 (1966) 10
California v. Taylor, 353 U.S. 553 (1957) 49
Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954) .. 59
Chicago & I.M.R. Co. v. Brotherhood of Railroad Trainmen, 315 F. 2d 771 (7 Cir., 1963), vacated as moot, 375 U.S. 18 (1963) 50
Columbia River Packers Assn. v. Hinton, 315 U.S. 143 (1941) 43
Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (D.C., S.D., N.Y. 1948) 67
Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) 25, 35, 70
Eastern Air Lines, Inc. v. Flight Engineers Internat'l Ass'n, 340 F. 2d 104 (5 Cir., 1965) 51
East Texas Fr. L. v. International Brotherhood, 163 F. 2d 10 (5 Cir., 1947) 45, 51
Electrical Workers v. NLRB, 366 U.S. 667 (1961) ...31, 62
Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711 (1945) .. 51
Florida East Coast Ry. Co. v. Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen, and Brotherhood of Locomotive Firemen and Enginemen, 362 F. 2d 482 (5 Cir., 1966) 10
Florida East Coast Ry. Co. v. Brotherhood of R. Trainmen, 336 F. 2d 172 (5 Cir., 1964), *cert. denied*, 379 U.S. 990 (1965) 10, 30
Florida East Coast Railway Company v. Jacksonville Terminal Company et al., Case No. 63-16, U.S.D.C., Middle District, Jacksonville Division, Florida ...7, 17
Garner v. Teamsters Union, 346 U.S. 485 (1953) 58
Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949) 48
Gunther v. San Diego and Arizona E. Ry., 382 U.S. 257 (1965) 49
Hanna Mining Co. v. Marine Eng. Ben. Ass'n., 86 S. Ct. 327 (1965), — U.S. — 26, 58
International Brotherhood of Electrical Workers, AFL-CIO v. NLRB, 350 F. 2d 791 (D.C. Cir., 1965), *cert. denied*, March 21, 1966, 16 L. Ed. 206, 86 S. Ct. 1196 60

Page

International Union, U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949) 41
Jacksonville Terminal Company v. Florida East Coast Ry. Co., (5 Cir., July 7, 1966), — F. 2d — (No. 22931) 14
Lakefront Dock S.R.T. Co. v. International Longshoremen's Ass'n, 333 F. 2d 549 (6 Cir., 1962) 50
Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938) ... 33, 37
Lee Way Motor Freight v. Keystone Freight Lines, Inc., 126 F. 2d 931 (10 Cir., 1942), *cert. denied*, 317 U.S. 645 ..... 45, 51
Local Union No. 25 v. New York, New Haven and H.R. Co., 350 U.S. 155 (1956) 61
Loewe v. Lawlor, 208 U.S. 274 (1908) 34
Marine Cooks and Stewards v. Panama Steamship Co., 362 U.S. 365 (1960) 33, 41
Marine Eng. Ben. Ass'n v. Interlake Steamship Co., 370 U.S. 173 (1962) 26, 58, 61
Masters, Mates & Pilots and Ingram Barge Co., 136 N.L.R.B. No. 112, 49 L.R.R.M. 1943 (1962) 67
Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965) 36
Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91 (1940) 37
Montgomery Ward & Co. v. Consolidated Freightways, 42 I.C.C. 225 (1943) 46, 68, 69
Montgomery Ward & Co. v. Northern Pacific Term. Co., 128 F. Supp. 475 (D. Ore. 1953), supplemental decision, 128 F. Supp. 520 69
New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) 33, 37
NLRB v. Denver Bldg. & Construction Trades Council, 341 U.S. 675 (1951) 39
N.L.R.B. v. Electrical Workers, CIO 228 F. 2d 553 (2 Cir., 1955), *cert. denied*, 351 U.S. 962 (1956) 67
N.L.R.B. v. Ins. Agents Int. Union, 361 U.S. 477 (1960) 49, 54
N.L.R.B. v. International Rice Mill Co., 341 U.S. 665 (1951) 64
N.L.R.B. v. Local 459, Electrical Workers, 289 F. 2d 62 (2 Cir., 1961) 67
N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F. 2d 503 (2 Cir., 1942) 41

Page

Order of Railroad Telegraphers v. Chicago and N.W. R. Co., 362 U.S. 330 (1960) 25, 30, 33, 46, 50, 52, 55
Order of Railway Conductors and Brakemen v. Louisville & Nashville Railroad Company, 331 F. 2d 368 (5 Cir., 1964) 30
Pan American World Airways, Inc. v. United Bro. of Carpenters & Joiners, 324 F. 2d 217 (9 Cir., 1963) 60
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 26, 58
Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) 26, 49, 52, 53
Southeastern Motor Lines v. Hoover Truck Co., 34 F. Supp. 390 (M.D. Tenn. 1940) 46
Truax v. Corrigan, 257 U.S. 312 (1921) 36
United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 68
United States v. Building & Construction Trades Council of New Orleans, 313 U.S. 539 (1941) 39
United States v. Florida East Coast Ry. Co., 221 F. Supp. 325 (D.C.D.C. 1963) 10
United States v. Florida East Coast Ry. Co., 55 LRRM 2798 (M.D. Fla., 1964) 10
United States v. Florida East Coast Ry. Co., 348 F. 2d 682 (5 Cir., 1965) 10
United States v. Hutcheson, 312 U.S. 219 (1941) 25, 27, 34, 37, 41, 62
United States v. International Hod Carriers' and Common Laborers' District Council of Chicago, 313 U.S. 539 (1941) 38
United States v. United Brotherhood of Carpenters and Joiners of America, 313 U.S. 539 (1941) ... 38
United Steelworkers v. NLRB, 376 U.S. 492 (1964) 31, 61, 66
Virginian R. Co. v. System Federation, 300 U.S. 515 (1937) 26, 48

STATUTES:

Clayton Act, 38 Stat. 730, 15 U.S.C. 12 *et seq.*: .....*passim*

§ 6, 15 U.S.C. 17 .....1-2, 34, 62, 68
§ 20, 29 U.S.C. 52 .....2-3, 34, 35, 36, 38, 62, 68

Page

Interstate Commerce Act 27, 52, 68, 69, 70

Part II, 49 U.S.C. §§ 301-327 45

National Labor Relations Act, as amended, Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 151 *et seq.:* 65, 66, 67, 68

§ 2, 29 U.S.C. 152 .....3, 59
§ 8(b)(4), 29 U.S.C. 158(b)(4) 27, 39, 47, 58, 59, 62
§ 10, 29 U.S.C. 180 .....39, 40, 58-59

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.:* .....*passim*

§ 4, 29 U.S.C. 104 .....27, 28, 53
§ 13, 29 U.S.C. 113 .....27, 28-29, 31, 42, 43, 46-47, 56

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151 *et seq:* .....*passim*

§ 2, 45 U.S.C. 152 48
§ 5, 45 U.S.C. 155 54
§ 10, 45 U.S.C. 160 54-55

Sherman Act, 26 Stat. 209, 15 U.S.C. 1 *et seq.* 34

CONGRESSIONAL MATERIAL:

48 Cong. Rec. 6421 (1914) 34

48 Cong. Rec. 6438 (1914) 34

75 Cong. Rec. 4618-4620 (1932) 55

75 Cong. Rec. 5503-5505 (1932) 55

93 Cong Rec. 4198 (1947) 40

95 Cong. Rec. 8709 (1949) 68

OTHER:

Frankfurter and Greene, The Labor Injunction (1930) 36

Holmes, "Privilege, Malice, and Intent" (1894), 8 Harv. L. Rev. 1 9

Norris, Fighting Liberal (1945) 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 220

TLANTIC COAST LINE RAILROAD COMPANY, JACKSONVILLE TERMINAL COMPANY, and SEABOARD AIR LINE RAILROAD COMPANY, *Petitioners,*

v.

ROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOWELL KENNEDY, T. C. BOLAND, and J. E. EASON, *Respondents.*

n Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth ircuit has now been officially reported at 362 F. 2d 9.

STATUTES INVOLVED

In addition to the statutory provisions set forth in e Appendix to petitioners' brief, respondents beve this case involves the following additional statuy provisions:

1. *Section 6 of The Clayton Act,* 38 Stat. 731, 15 U.S.C. 17:

"Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing in

the antitrust laws shall be construed to forbid t existence and operation of labor, agricultural, horticultural organizations, instituted for the pu poses of mutual help, and not having capital sto or conducted for profit, or to forbid or restrain i dividual members of such organizations from la fully carrying out the legitimate objects thereo nor shall such organizations, or the membe thereof, be held or construed to be illegal combin tions or conspiracies in restraint of trade, und the antitrust laws."

2. *Section 20 of the Clayton Act,* 38 Stat. 73 29 U.S.C. 52:

"Sec. 20. That no restraining order or injun tion shall be granted by any court of the Unite States, or a judge or the judges thereof, in a case between an employer and employees, or b tween persons employed and persons seeking e ployment, involving or growing out of, a dispu concerning terms or conditions of employment, u less necessary to prevent irreparable injury property, or to a property right, of the par making the application, for which injury there no adequate remedy at law, and such property property right must be described with partic larity in the application, which must be in writi and sworn to by the applicant or by his agent attorney.

"And no such restraining order or injuncti shall prohibit any person or persons, whetb singly or in concert, from terminating any relati of employment, or from ceasing to perform a work or labor, or from recommending, advisi or persuading others by peaceful means so to d or from attending at any place where any su person or persons may lawfully be, for the purpo of peacefully obtaining or communicating inf mation, or from peacefully persuading any pers to work or to abstain from working; or from ce

ing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

3. *Section 2 (2) - (5) of The Labor Management Relations Act, 1947*, 49 Stat. 450, 61 Stat. 137, 29 U.S.C. 152 (2) - (5):

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to be benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural

laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Respondents also submit that the First Amendment to the United States Constitution is here involved:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Introduction

This is another case arising out of the Florida East Coast Railway Company's[1] long-standing labor difficulties going back to January, 1963. It is safe to say that these labor difficulties constitute not only the longest railroad strike in this nation's history, but that

[1] Hereinafter sometimes referred to as FEC.

they have also spawned more expensive and time-consuming litigation than any other single railroad's labor problems.

Since cases are not and should not be decided in a vacuum, the spate of *reported* companion cases arising out of the various FEC strikes are set forth below for the information of the Court.[2] There are at least an

---

[2] In chronological order the reported cases arising out of the FEC strike are as follows:

5/ 7/63 *United States* v. *Florida East Coast Ry. Co.* (D.C.D.C. 1963), 221 F. Supp. 325, 53 LRRM 2942.

9/13/63 *Broward County Port Authority* v. *Order of R. R. Telegraphers* (Fla. Cir. Ct. 1963), 54 LRRM 2228.

11/13/63 *Broward County Port Authority and Order of Railroad Telegraphers* (1963), 144 NLRB No. 115, 54 LRRM 1312.

3/ 2/64 *United States* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 55 LRRM 2798.

3/ 2/64 *United States* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 55 LRRM 2802.

3/ 2/64 *Brotherhood of R. Trainmen* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 55 LRRM 2560.

8/18/64 *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen* (5 Cir., 1964), 336 F. 2d 172, 56 LRRM 3009, cert. den., 379 U.S. 990, 58 LRRM 2256.

10/30/64 *United States* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 57 LRRM 2618.

11/ 5/64 *Brotherhood of Locomotive Engineers* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 57 LRRM 2641.

11/25/64 *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen* (5 Cir., 1965), 341 F. 2d 299.

12/ 4/64 *Brotherhood of Locomotive Engineers* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1964), 58 LRRM 2283.

1/26/65 *Florida East Coast Ry. Co.* v. *Brotherhood of Loc. Eng.* (5 Cir., 1965), 341 F. 2d 99.

1/26/65 *Florida East Coast Ry. Co.* v. *United States* (5 Cir., 1965), 340 F. 2d 319.

6/ 8/65 *Brotherhood of Locomotive Firemen & Enginemen* v. *Florida East Coast Ry. Co.* (5 Cir., 1965), 346 F. 2d 673, 59 LRRM 2476.

(Footnote continued on page 6)

equal multitude of *unreported* cases in state and federal courts and administrative agencies, many of which are still pending.

7/14/65 *Florida East Coast Ry. Co.* v. *Mason* (Fla. S. Ct., 1965), 177 So. 2d 217.

7/16/65 *International Brotherhood of Electrical Workers* v. *NLRB* (D.C. Cir., 1965), 350 F. 2d 791, cert. den., — U.S. —, 86 S. Ct. 1196.

7/21/65 *United States* v. *Florida East Coast Ry. Co.* (5 Cir., 1965), 348 F. 2d 682, 59 LRRM 854.

9/30/65 *Brotherhood of Locomotive Engineers* v. *Florida East Coast Ry. Co.* (M.D. Fla. 1965), 60 LRRM 2292.

5/23/66 *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry. Co.* (1966), 384 U.S. 238, 86 S. Ct. 1920, affirming *United States* v. *Florida East Coast Ry. Co.* (5 Cir., 1965), 348 F. 2d 682.

6/14/66 *Florida East Coast Ry. Co.* v. *Brotherhood of Locomotive Engineers* (5 Cir., 1966), 362 F. 2d 482.

6/15/66 *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line RR. Co.* (5 Cir., 1966), 362 F. 2d 649.

6/ 6/66 Order reinstating injunction on conditions, ... U.S. ...., 86 S. Ct. 1856.

6/20/66 Certiorari granted, ... U.S. ...., 86 S. Ct. 1925.

Cases collaterally involving the strike are:

3/ 4/64 *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Co.* (5 Cir., 1964), 328 F. 2d 720, cert. den., 379 U.S. 830 (1964).

11/22/64 *I.C.C.* v. *Florida East Coast Ry. Co.* (1965), ... U.S. ...., 86 S. Ct. 277.

7/ 7/66 *Jacksonville Terminal Co.* v. *Florida East Coast Ry.* (5 Cir., July 7, 1966), ... F. 2d .... (No. 22931).

Among the multitude of unreported cases in state and federal courts and administrative agencies, many of which are still pending, is:

1/30/63 *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Company, Atlantic Coast Line RR. Co., Seaboard Air Line RR. Co., Southern Ry. Co., and Georgia Southern and Florida Ry. Co.*, Case No. 63-16, M.D. Fla., wherein the injunction that appears in the Record, R. 145-154, was entered.

Respondents sincerely believe that both the stubborn duration of FEC's labor disputes and the prolific litigation resulting are, at least in large part, a direct result of federal labor injunctions which have effectively granted the Florida East Coast Railway "safe harbor" at both its northern and southern termini to interchange traffic with connecting carriers immune from the effects of peaceful, primary picketing by the striking unions against such interchange.[2] These injunctions, entered at the outset of a strike, have virtually stripped the various striking unions of their only peaceful, and we say lawful, economic weapons for self-help. In each case, the federal labor injunction effectively restrained orderly, peaceful, non-violent conduct aimed directly at FEC's regular, day-to-day operations and carried on (without trespassing) in publicly-owned areas located as close as possible to the physical place where the FEC operations were regularly being carried on.

This case involves the latest of such federal labor injunctions. Respondents propose to demonstrate in this brief that the effect of this injunction is to alter

[2] The injunction involved at the southern end of the FEC's system, compelling the connecting carrier's employees to disregard the striking unions' picket line posted at the place where interchange occurred, was entered in June, 1963, and was reversed some two years later in *Brotherhood of Locomotive Firemen & Enginemen* v. *Florida East Coast Railway Company* (5 Cir., 1965), 346 F. 2d 673. A similar injunction to the one there involved was entered at FEC's northern end on January 30, 1963, in a case to which the unions were not parties, and could not become parties (R. 284), entitled *Florida East Coast Railway Company* v. *Jacksonville Terminal Company et al.*, Case No. 63-16, U.S. District Court, Middle District, Jacksonville Division, Florida. The record in that case was introduced as Defendants' Exhibit A in this case, and excerpts therefrom appear in the Record, pp. 194-285; the injunction itself appears at R. 245-254.

drastically the balance of economic power legislated by Congress in this vital transportation industry, contrary to the letter and the spirit of the Norris-La Guardia Act, 29 U.S.C. 101 et seq., and the Clayton Act, 38 Stat. 730, 15 U.S.C. 17, 29 U.S.C. 52, and to the scheme of the Railway Labor Act, 45 U.S.C. 151 et seq. With all deference, respondents submit that the District Court's judicial action here involved represents a return to an earlier day when the federal courts regularly became actively involved in terminating labor controversies affecting interstate commerce—almost invariably in favor of the "property" right of management to continue operations free from the concerted effects of peaceful labor activity deliberately designed to interfere with such operations.

As early as 1894 Justice Holmes, writing on the subject of the tort of intentional infliction of damage by one upon another, recognized that the judicial resolution of such cases necessarily and particularly involved questions of policy of a legislative nature, saying:

> "Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. * * *
>
> "* * *
>
> "* * * The ground of decision really comes down to a proposition of policy of rather a delicate

nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue.

"* * *

"* * * I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. * * *" Holmes, "Privilege, Malice, and Intent" (1894), 8 Harv. L. Rev. 1, 7-9.

Respondents' basic position is that Congress has weighed the serious legislative considerations here involved and has resolved them in the Clayton Act and again in the Norris-LaGuardia Act, contrary to then-prevailing judicial solutions and contrary to the judicial solution here proposed by petitioners.

Background of FEC Strikes

In January, 1963, eleven non-operating[4] crafts went on strike against the Florida East Coast Railway over

[4] In 1893 Eugene V. Debs's American Railway Union was formed under his leadership to unite all railroad workers in one organization. Since the collapse of that Union following termination of the Pullman strike of 1894 by federal injunction and federal troops sent to Chicago by President Cleveland (in spite of the protest of Governor Altgeld), railroad employees have traditionally been organized along craft lines. "Non-operating" crafts refer to trades such as shopmen, clerks, telegraphers, maintenance of way and signal employees, etc., that are not actually engaged in running trains; "operating" crafts refer to trades such as trainmen, engineers, conductors, etc., that actually do run trains. The Railway Labor Act itself recognizes this prevailing pattern of organization, e.g., Section 3, First (h), 45 U.S.C. 153, First (h).

a wage dispute. The Railway ceased operations. Shortly thereafter it resumed operations on a limited but gradually increasing scale. By the end of 1963 it had achieved substantially pre-strike levels of operation as to car-load freight service, although it had not resumed either passenger or less-than-car-load freight service.

This resumption of operations was made possible by two controlling factors:

1. FEC's wholesale disregard of the provisions of the Railway Labor Act concerning the maintenance of existing contract rates of pay, rules, and working conditions. See, e.g., *United States* v. *Florida East Coast Ry. Co.* (D.C.D.C. 1963), 221 F. Supp. 325; *United States* v. *Florida East Coast Ry. Co.* (MD. Fla. 1964), 55 LRRM 2798; *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen* (5 Cir. 1964), 336 F. 2d 172, cert. den., 379 U.S. 990; *United States* v. *Florida East Coast Ry. Co.* (5 Cir. 1965), 348 F. 2d 682, affirmed *sub nom., Brotherhood of Railway Clerks* v. *Florida East Coast Ry. Co.*, 384 U.S. 238 (1966); *Florida East Coast Ry. Co.* v. *Brotherhood of Locomotive Engineers, Order of Railway Conductors and Brakemen, and Brotherhood of Locomotive Firemen and Enginemen* (5 Cir. 1966), 362 F. 2d 482.

2. FEC's success in obtaining two federal labor injunctions compelling its connecting carriers *and their employees* to interchange cars with it and to render essential labor services to it. See, e.g., Defendants' Exhibit A (R. 245-254, 159); *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry. Co.* (5 Cir. 1965), 346 F. 2d 673.

By late 1964, when the FEC was finally required through court action to restore contract working condi-

tions, many of the operating craft members who were not on strike, but who had been honoring the non-operating unions' picket lines, went back to work. The FEC, however, continued to process its so-called Section 6 (45 U.S.C. 156) proposals to abolish all existing contracts with the operating crafts and substitute therefor its "Uniform Working Agreement" which radically altered seniority rights, wages, craft lines, hours, etc., in ways deemed highly detrimental by the unions. On April 24, 1966, having exhausted the procedures of the Railway Labor Act, the FEC declined the National Mediation Board's proffer of arbitration (R. 141-143) and unilaterally implemented its proposed "Uniform Working Agreement" for the crafts of trainmen and yardmen (represented by the Brotherhood of Railroad Trainmen, or BRT), conductors (represented by the Order of Railway Conductors and Brakemen, or ORC&B) and hostlers (represented by the Brotherhood of Locomotive Firemen & Enginemen, or BLF&E). (R. 140-143). In response the three organizations, respondents here, went on strike (R. 142). Ten days later, the BRT commenced the picketing here involved. Such picketing was, as described by the Court of Appeals (R. 41), both "peaceful and effective" until restrained by the District Court below some 13 hours later.

FEC-Jacksonville Terminal Operations

The FEC main line runs down the east coast of Florida roughly from Jacksonville to Miami. In Jacksonville the FEC connects, and interchanges cars, with four interstate railroads (R. 198-199, 259, 266): the Atlantic Coast Line Railroad Company (hereinafter Coast Line), the Seaboard Air Line Railroad Company (hereinafter Seaboard), the Southern Rail-

way Company (hereinafter Southern), and the Georgia Southern and Florida Railway Company (hereinafter Georgia Southern). All of this interchange, amounting in 1965 to some 231,787 freight cars (R. 13), is required by contract between FEC and those railroads to be accomplished by FEC's use of the interchange freight yards and facilities and services (including labor services) of the Jacksonville Terminal Company (Defs' Exh. A; R. 232-234, 208-244, 199-201, 259-260, 266, 122, 159). That contract thus provides:

> "Twentieth. That they, the Railway Companies, will use the said station building and passenger facilities and interchange freight yard of the Terminal Company (and no other save as in this Article hereinafter provided), for the handling of all their passenger train business including trains containing mail, baggage and express as well as passengers and for the handling of all the freight business interchanged between the parties hereto, or any of them, in the City of Jacksonville for and during the full term hereby created; * * *" (Defs' Exh. A; R. 232-233, 159, 84-86)

The Jacksonville Terminal Company can best be described as the corporate vehicle for a joint venture by its four owners, the FEC, the Coast Line, the Seaboard, and the Southern. The Terminal Company itself is jointly owned in equal shares by the four railroads (R. 83, 81, 122, 68). By contract among themselves, these four railroads, and Georgia Southern, are each granted equal right to the joint and common use of "all and singular, the passenger and freight terminal facilities of the Terminal Company in the City of Jacksonville and State of Florida, including the passenger station building situated on the south side of

West Bay Street, and the train sheds, tracks and yards of the Terminal Company * * * Together with all the houses, offices, express, baggage and waiting rooms, platforms and appurtenances, and yard, shop and repair and other services, facilities and privileges of whatsoever nature, to the said station building, tracks and property belonging or in any wise appertaining, which may be necessary for the movement of trains and the use, comfort and convenience of passengers, and handling of baggage, mail and express, the transportation, movement and switching of loaded and empty freight cars, and the transaction of passenger and freight business at said City of Jacksonville, * * *" (Defs' Exh. A; R. 212-213, 159). Such use of the Terminal Company's facilities is paid for on a cost basis, allocated according to the percentage use by each railroad of the different categories of the Terminal Company's services, property and facilities (Defs' Exh. A; R. 213-225, 159). Deficits resulting beyond such cost reimbursements are borne by the four owners (Defs' Exh. A; R. 214, 221-222, 223, 225). Profits, if any, are automatically and regularly credited to the four owners in equal proportions without the formality of declared stock dividends (Defs' Exh. A; R. 224, 159, 84-86).

The Board of Directors of the Terminal Company is composed of representatives from each of the four ownership railroads (R. 69, 97). Any capital expenditure or the incurrence of any "extraordinary" operating expense must be referred by the President and General Manager to the Board of Directors (R. 97). And within the Board of Directors almost all important or policy-controlling decisions are not made by majority vote, but rather require the unanimous consent of all the owning roads (Defs' Exh. A; R. 216,

220, 221, 224, 225, 232, 234, 236-237). Significantly, the President or General Manager and all officers elected by the Board of Directors are appointed and serve only with the unanimous consent of the four owner-railroads and must be dismissed upon written request of any one of them, as must also any subordinate official of the Terminal Company (Defs' Exh. A; R. 234, 159). In this regard, the FEC has recently exercised its control and compelled the dismissal of the Terminal Company's President and General Manager and the dismissal of its General Counsel. In affirming the FEC's right-of-control, the Court of Appeals for the Fifth Circuit commented about the unique arrangement whereby the FEC and each of the three other owner-lines is vested with decisive control over the affairs of the Terminal Company as follows:

> "The contract, though plain and positive, is indeed most unusual. The controversy centers around Art. 21. [Footnote 1 omitted] Under it any of the owner-lines is entitled at any time to demand the dismissal of the President or General Manager of the Jacksonville Terminal, their jointly owned terminal subsidiary. Likewise, selection of a new President requires the unanimous approval of all owner-lines.[2] [Footnote 2: This 'unanimous consent' approach is found elsewhere in many parts of the Guaranty and Operating Agreement, including issuance of new bonds, changes in accounting procedure, disbursement of certain funds, incurring debts for construction, furnishing of new facilities, issuance of capital stock, and the like.]" *Jacksonville Terminal Company* v. *Florida East Coast Ry. Co.*, (5 Cir., July 7, 1966) — F. 2d — (No. 22931) (page 2 of slip opinion)

In short, the FEC and the four other "tenant line railroads" (R. 79) each has the right to use equally and

in common all the tracks, yards, switches, facilities and services of the Jacksonville Terminal Company. In addition the FEC and the three other owner-lines each has a decisive right-of-control over the Terminal Company's management and operations.

Availing itself of these rights, the FEC daily operates its trains with FEC crews both on and through the Terminal Company premises (R. 132, 152, 92, 109). In the case of FEC-Coast Line interchange, the FEC regularly and daily runs its trains completely through the Terminal Company's system from the south end to the north end and on into the Coast Line's Moncrief switching yard (R. 131-132, 152, 70). In regard to FEC-Seaboard interchange, the FEC interchanges cars with Seaboard in the Honeymoon and YH switching yards located on Terminal Company premises and within the Terminal Company's boundaries, or right-of-way (R. 136-137; Pls' Exh. 1-map; R. 183, 72, 75, 92).[5]

Not only does the FEC itself operate on Terminal Company premises, but the Terminal Company in the course of such operations regularly furnishes to the FEC a multitude of skilled labor services essential to the FEC movements. These were described by the

---

[5] Witness Satterwhite testified that the YH yard is owned by the Terminal Company and Honeymoon Yard by Seaboard (R. 136). Plaintiffs' Exhibit #1 (an engineer's map prepared in the office of the Terminal Company's president, R. 72), however, shows both YH and Honeymoon yards to be located within the "J.T. Co. R/W" which presumably stands for Jacksonville Terminal Company right-of-way (Pls' Exh. 1—map; R. 183, 72, 75, 92). Access for FEC to both yards is only available through Terminal Company premises and over Terminal Company tracks (R. 137).

Terminal Company's president and general manager as follows (R. 91-93):

"Q. All right, sir. What services are performed by the Jacksonville Terminal Company for the Florida East Coast Railroad?

A. We service their passenger equipment, their passenger engines, in and out; as well as their coaches. For a car cleaning, ice, and water. And any Terminal expense in the way of airconditioning or repairs that might be needed.

Q. All right, sir. In the operation of the Terminal Company, insofar as furnishing services to the Florida East Coast, is an integral part of the op eration of the Florida East Coast Railroad?

Mr. Adams: Your Honor, that calls for a conclusion as to what the Florida East Coast considers an integral part of the operations.

The Court: I will let the witness answer, if he can. I wi l overrule the objection.

The Witness: It is necessary to operate from the passenger station down the St. Johns River where they get on their own track.

By Mr. McAliley:

Q. All right, sir. It is also necessary in terms of interchanging with freight, to use the Terminal Company; is it not?

A. Oh, yes. They use Terminal Company tracks altogether to interchange freight with the three other railroads.

Q. And this is done on a day-to-day, week-to-week, and month-to-month basis?

A. Yes.

Q. The interchange of freight?

A. Yes.

Q. On your property?

A. Yes.

Q. With your assistance?

A. With our employees, yes, sir.

Q. And with your facilities?

A. Yes."

Jacksonville Terminal Company employees throw switches for FEC train movements (R. 78, 93, 120-121), operate signals for FEC train movements (R. 78), repair FEC engines and passenger cars in the Terminal Company's mechanical department (R. 113), maintain tracks, switches, towers, signals, etc. used by FEC (R. 110), inspect passenger cars for FEC (R. 93), and themselves directly interchange freight cars with FEC (R. 110). Over 31 per cent of all Terminal Company freight interchange (R. 13, 109),[6] and over 24 per cent of *all* interchange in 1965 was FEC's (R. 13). Significantly, during the picketing here involved, FEC supervisors were called in and supplied to perform some of these essential labors (R. 91, 79). The travelling public, of course, does business with FEC on the Terminal Company premises (R. 93).

The very injunction entered by the District Judge below in January, 1963, in the case arising out of the earlier non-operating unions' strike, *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Company et al.*, Case No. 63-16, U.S. District Court, Middle District, Florida (Defs' Exh. A; R. 245-254. 159), recites and catalogues the many and varied services that Terminal Company employees, if they report to work, must perform for a struck carrier (R. 251, 253). The FEC by obtaining such injunction literally drafted the Terminal Company and its employees (as well as petitioners Coast Line and Seaboard and their employees to the

[6] Which of the five railroads using the Terminal is the largest single user is not disclosed by the record, but obviously FEC's freight use is among the highest. ACL has other trackage by which it can by-pass the Terminal (R. 131). It cannot be said that the FEC is not a principal user of the Terminal.

extent covered by the injunction) to become FEC's allies in FEC's economic battle with FEC's own employees. Brother union workers were thereby dragooned into FEC's service and forced to perform tasks for that carrier indispensable to its continued operations.[7]

Both petitioners Seaboard and Coast Line advised the District Court that the Terminal Company was "a necessary adjunct" to their operations (R. 15, 11). By the same token, it clearly appears that the Terminal Company is a necessary adjunct—and an integral, integrated part—of FEC's regular operations. As stated below by the District Court and counsel for the Terminal Company (R. 102):

> "The Court: Is it significant that the FEC could not operate its trains without the assistance of the Terminal? It is an integral part of the operations of the FEC, is it not?
>
> "Mr. Adams: It is true that the FEC could not operate its trains without the assistance of the Terminal Company. And neither could the Atlantic Coast Line Railroad Company or the GS&F or the Southern or the Seaboard.
>
> I think this is the reality of the situation.
>
> * * *
>
> * * *"

[7] Although petitioners each asserted to the District Court in Case No. 63-16 that the FEC had failed to join indispensable parties to that case (Defs' Exh. A; R. 259, 265, 159), they each vigorously opposed respondents' and the non operating unions' efforts to intervene in that case (R. 197, 274-283) and the District Judge refused to allow such intervention (R. 284).

The Picketing

On May 4, 1966, the BRT established pickets at various foot, road, and rail entrances to the Jacksonville Terminal Company.[8] In all cases and at all times these pickets conducted themselves in an orderly and peaceful manner (R. 66-67, 88-89). There were no threats, fights, epithets, or physical blockage of traffic or of egress and exit; in total numbers, there were 32 pickets spread out over a perimeter of 1½ to 2 miles (R. 88-89). Each picket carried a sign conveying the message:

FELLOW RAILROAD MEN
Do Not Cross or Assist F.E.C.
B. OF R. T.
ON LEGAL
STRIKE
AGAINST F.E.C.
Please Make Common Cause With Us In
Major Dispute Against F.E.C.

In each and all cases the pickets were located on public property (Pls' Exh. 1; R. 165-183, 75, 72-137). In each and all cases the pickets were stationed as close as possible, without trespassing on private property, to the place either (1) where the FEC was regularly

[8] Petitioners erroneously state that the picket line was thrown up by all three respondents (Petitioners' brief, p. 8). Significantly, the District Court did not so find (R. 28), and counsel for the Terminal Company conceded in the trial court that there was no evidence of actual participation by the ORC&B or BLF&E in conducting the picket line (R. 163-164). The names of these two organizations had been blocked out of the picket signs (R. 150-151). Obviously at one time there had been plans for joint picketing; obviously such plans had been abandoned. The District Court included the two non-picketing unions in its injunction on the basis that they had threatened to picket (R. 28).

conducting its operations in making interchange of cars with petitioners, or (2) where Terminal Company employees who regularly perform services for the FEC report to work or perform such work (R. 89-90).

Three particular picket locations, however, have been singled out by petitioners as involving or affecting only Coast Line or Seaboard train movements, and therefore as evidencing purely secondary picketing (petitioners' brief, pp. 9-10, note #13). These are the locations at Dennis Street, Stockton Street, and Acorn Street (petitioners' brief, p. 10, notes #13, 14).

Dennis Street: Petitioners claim that the BRT picketed the Coast Line tracks at Dennis Street. The location, of the pickets at Dennis Street, however, is conclusively shown by both photographic evidence and eye-witness testimony of petitioners' own witness, Mr. Jennette, the president of the Terminal Company. His testimony on cross-examination is as follows (R. 93-94):

> "Q. Oh, one question about Dennis Street. Now, so that the record can be very clear, where is Dennis Street on the map?
>
> A. (Indicating).
>
> Q. All right, sir. Now, adjacent or beside Dennis Street there is a dirt road that is an entrance into your premises?
>
> A. There is a driveway that leads between some leased property and our material yard where we have cross and switch ties stored, and this driveway is also used by a tenant of ours who is in the paving business and has lime rock and equipment stored east of that driveway.
>
> Q. And the employees sometimes go to work through that driveway?
>
> A. They don't report to work there, but they have to go in and out of there to get material.

Q. This morning, sir, did you or any of your supervisors call employees and instruct them to come in through that driveway near Dennis Street?

A. Not to my knowledge.

Q. All right, sir. Now, did you ever see any picket at Dennis Street walking across the railroad track, sir? Or were they located on that driveway?

A. At the time I saw them, they were located on the driveway."

The photographic evidence confirms this testimony clearly, and shows that the pickets at Dennis Street were *not* picketing the Coast Line tracks (Pls' Exh. 1; R. 182, 75; compare photograph of pickets at Dennis Street, R. 182, with photographs immediately preceding, R. 181-180). The only evidence to the contrary was an affidavit given by Mr. Jennette not subject to cross examination and objected to by defendants (R. 10, 98, 160)[9] and the hearsay testimony of the Coast Line's general manager, L. T. Andrews (R. 63, 71, 130), who admitted on cross-examination he had not personally observed the picketing he was describing (R. 68). Significantly, the District Court made no finding that the BRT had picketed any exclusively Coast Line or Seaboard operations, and found only that BRT on May 4, 1966 "began to picket the premises of the Jacksonville Terminal Company at numerous places." (R. 28).

Stockton Street: The pickets at Stockton Street did picket the Seaboard tracks at that location. These are

[9] See Section 7 of the Norris-LaGuardia Act, 29 U.S.C. 107, pp. 41a-43a of petitioners' brief, providing that no injunction shall issue in any case involving or growing out of a labor dispute "except after hearing testimony of witnesses in open court (with opportunity for cross-examination) • • •."

tracks that lead into YH and Honeymoon yards where all of the interchange between Seaboard and FEC takes place (R. 136-137). Stockton Street is the closest public road crossing to those yards (R. 87-88, 137). Seaboard employees approaching YH and Honeymoon yards by way of Stockton Street from the south-west to do business with FEC can be appealed to at no closer location to the place where FEC regularly operates vis-a-vis Seaboard than at Stockton Street, as the map, plaintiffs' exhibit 1, R. 183, 75, plainly reveals.

Acorn Street: The testimony is conflicting as to the location of the pickets at Acorn Street. Mr. Jennette, president of the Terminal Company, testified that the pickets on Acorn Street were located "at the entrance to our Repair Shop and right near the corner of Acorn and Beaver * * *" (R. 74). This is a place, he confirmed, where Terminal Company employees report to work (R. 90). Mr. Satterwhite, assistant superintendent of Seaboard, on the other hand, testified that the pickets were at the crossing of the Seaboard over Acorn Street (R. 136). If plaintiffs took photographs of the pickets at Acorn Street as they did of the other picket locations, such photographs were not produced. In any event, the Seaboard crossing of Acorn, like the Seaboard crossing at Stockton, is the closest public place to Seaboard's northern access route to YH and Honeymoon yards where Seaboard and FEC perform their interchange business with each other. It is not, in other words, track used by Seaboard for business exclusively unrelated to FEC. It is the only place where pickets can appeal to Seaboard employees approaching YH and Honeymoon yards from the north to interchange with FEC, and is the closest possible

place to where such interchange takes place (without trespassing on private property).

The Reserved Gate

Shortly after the non-operating unions went on strike against the FEC in January, 1963, the Terminal Company posted signs at two employee foot entrances to its premises purporting to limit one entrance (at Stuart and Bay Streets) exclusively for use of FEC employees and the other entrance (at Johnson and Bay Streets) for the exclusive use of Seaboard, Coast Line, Southern and Terminal Company employees (R. 79-80; Pls' Exh. 1-photographs, R. 175, 174, 172). Obviously neither entrance could be used by either category of employees entering on the premises by rail; nor did the FEC gate sign pretend to apply to persons coming on the premises to do business with the FEC, e.g., prospective passengers, shippers, suppliers, etc.

The record further shows that the restrictions posted as to either gate were not observed.

As to the gate at Johnson and Bay Streets, designated for use by Terminal Company employees, the testimony of Mr. Jennette, Terminal Company president and general manager, shows that actually such employees use a myriad of other entrances when entering by foot (R. 89-90).

Likewise, the evidence shows that the posted gate restrictions at Stuart and Bay Streets were neither observed nor enforced.

Thus, Mr. Jennette testified on cross-examination (R. 86-87):

> "Q. Now, as to this gate and the sign erected near Stuart Street, have you ever seen a Florida

East Coast Railway employee use that entrance?

A. No. sir.

Q. Do you know for a fact, sir, that employees of the Florida East Coast Railway use the other entrance?

A. No, I don't know that either.

Q. All right, sir. How do they get in there?

A. Well, as indicated in these pictures, there are many ways that you can enter the Terminal Company."

Finally, of course, the fact should be noted that a limitation on picketing to a gate used exclusively by FEC employees prohibits absolutely any appeal being made or communicated to employees of the Terminal Company or connecting carriers who enter the premises to perform work for the FEC or to do business with FEC by interchanging cars with it.

SUMMARY OF ARGUMENT

This case, as held by the Court of Appeals below, involves and grows out of a labor dispute between petitioners and respondents, clearly within the terms and spirit of the Norris-LaGuardia Act. The labor injunction as entered by the District Court below was, therefore, entered without and beyond the jurisdiction of any court of the United States.

Respondent BRT's conduct in picketing various rail and foot entrances to the Jacksonville Terminal Company was legitimate traditional concerted activity directed at a primary situs of the operations of the Florida East Coast Railway Co., where such carrier receives and makes deliveries of railroad cars at interchange, and receives certain day to day services essential to its operations from the Terminal Company and connecting carriers. Such conduct is wholly within

the definitional language of the Norris-LaGuardia Act and fully justified by the economic self-interest of respondent BRT and those employees of petitioners who honored respondents' appeal.

The historical development of the "national labor policy" from the passage of the labor provisions of the Clayton Act of 1914, 15 U.S.C. § 17, 29 U.S.C. § 52, frustration of such provisions in the courts, e.g., *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921), and reassertion by Congress of these initial purposes in the Norris-LaGuardia Act, *United States* v. *Hutcheson,* 312 U.S. 219, 235-236, demonstrate beyond cavil that respondent BRT's activity under any view of its essential nature, i.e., primary or secondary, is embraced and protected by the clear language of Norris-LaGuardia.

Congress in the Railway Labor Act, 45 U.S.C. § 151 et seq., did not purport to establish procedures wherein all rail labor disputes would be settled without self-help becoming available. *Brotherhood of Locomotive Engineers* v. *B. & O. RR. Co.,* 372 U.S. 284 (1963). The Norris-LaGuardia Act was intended by Congress, and has been held by this Court to be squarely applicable to railway labor controversies when self-help and the resolution of a dispute through the free play of economic force becomes available. *Order of Railroad Telegraphers* v. *Chicago* v. *N.W. R. Co.,* 362 U.S. 330 (1960); *Brotherhood of R.R. Trainmen* v. *Toledo P.&W.R. Co.,* 321 U.S. 50 (1944).

Petitioners point to no specific provision in the Railway Labor Act which purports to require "accommodation" of Norris-LaGuardia. Neither protection of the jurisdiction of any agency under the Railway Labor Act, *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.*

Co., 353 U.S. 30 (1957), nor the enforcement of any mandatory statutory duty, *Virginian R. Co.* v. *System Federation*, 300 U.S. 515 (1937); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768 (1952), is suggested by petitioners to justify their bold plea for "* * * judicial obliteration of the [Norris-LaGuardia] Act under the soft euphemism of 'accommodation' * * *", *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 209 (1962). Due regard for the role of Congress in weighing the delicate legislative considerations involved in any limitations upon respondents' self-help right requires rejection of petitioners' argument.

The decision of the Court of Appeals below that the District Court lacked jurisdiction to enter the labor injunction here involved is supported by the wholly separate ground of the applicability of the doctrine of jurisdictional "preemption." Respondents' conduct herein, alleged to be an illegal "secondary boycott" by petitioners in this case and companion litigation to the present case,[10] is "arguably subject" to the exclusive primary jurisdiction of the National Labor Relations Board. In such circumstances state and federal courts alike lack jurisdiction to decide on the merits the jurisdictional question prior to an NLRB ruling. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 239 (1959); *Marine Eng. Ben. Ass'n.* v. *Interlake S.S. Co.*, 370 U.S. 173 (1962); *Hanna Mining Co.* v. *Marine Eng. Ben. Ass'n.*, — U.S. —, 86 S. Ct. 327 (1965).

The protections afforded by the Clayton Act are fully applicable to respondent BRT's conduct herein, and such provisions expressly relieve the conduct from the

---

[10] *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, No. 244 O.T. 1966.

taint of being a violation of any law of the United States. *United States* v. *Hutcheson, supra.*

Even as against the standards established under Section 8(b)(4) of the LMRA, 29 U.S.C. § 158(b)(4), respondent BRT's conduct is lawful primary picketing at a "common situs" which is an integral part of the struck carrier's system, which is owned and controlled in part by FEC, which is a place where FEC trains and crews daily operate and where "struck work" is being done.

Respondent BRT's conduct does not violate the Interstate Commerce Act in that it is wholly justified by economic self-interest and protected by the Clayton Act. Petitioners' duties under the Interstate Commerce Act are not absolute, and the strike and picketing of FEC operations by respondent BRT justifies petitioners' inability to perform interchange.

ARGUMENT

I. THE NORRIS-LAGUARDIA ACT, BY ITS OWN TERMS, BY LONG-STANDING INTERPRETATION OF THIS COURT, AND READ EITHER IN CONNECTION WITH OR APART FROM THE RAILWAY LABOR ACT, PRECLUDES FEDERAL COURT JURISDICTION TO ENTER THE LABOR INJUNCTION HERE INVOLVED [11]

The Court of Appeals below found that Sections 4 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104,

---

[11] While petitioners urge an "accommodation" of the Norris-LaGuardia Act to the Railway Labor Act as the initial step for the Court to consider, respondents submit that a sounder approach would be first to examine the applicability of the Norris-LaGuardia Act to the present dispute, and then to proceed to an examination of the alleged necessity of an "accommodation." One must assume that the impetus for suggesting the initial consideration of "accommodation" involves an appreciation of the applicability of the Norris-LaGuardia Act to the purported situation, said to require "accommodation."

113, were applicable to deprive the District Court of jurisdiction to enter the labor injunction here at issue.

These provisions are as follows:

Section 4 (29 U.S.C. Section 104):

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence; . . .
>
> (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified."

Section 13 (29 U.S.C. § 113)

> When used in this chapter, and for the purposes of this chapter—
>
> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or

associations of employers and one or more employers or associations of employers; (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "person participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer or employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

Looking to the language of the Act itself, it would seem apparent that the present dispute falls well within the scope of the statutory definitions.

The case arises out of a labor dispute between the Florida East Coast Railway Company and respondents

and involves a "labor dispute" within the meaning of the Norris-LaGuardia Act between respondents and petitioners. In the parlance of Railway Labor Act decisions the dispute between respondents and FEC, involving changes in rules, rates of pay, and working conditions, is a "major dispute". After the parties have exhausted the procedures of the Railway Labor Act, as they have done here, and no agreement has been reached, each party is entitled to resort to "self-help", *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio Railroad Company*, 372 U.S. 284 (1963); *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 80 S. Ct. 761 (1960); *Florida East Coast Railway Company* v. *Brotherhood of Railroad Trainmen*, 336 F. 2d 172 (5th Cir. 1964), cert. den., 379 U.S. 990; *Order of Railway Conductors and Brakemen* v. *Louisville & Nashville Railroad Company*, 331 F. 2d 368 (5th Cir. 1964).

As a part of their self-help right, respondents[12] were peacefully patrolling at the premises of the Jacksonville Terminal Company giving publicity to their dispute and appealing to others to refuse to perform work for, make deliveries to, and take deliveries from the struck carrier, FEC. The relief which respondents sought against petitioners, through their appeals to petitioners' employees, was well within the scope of legitimate, traditional labor objectives. Respondents sought to halt FEC operations by peacefully persuading petitioners, both supervisors and employees, at the situs where they normally do business with FEC,

---

[12] Although the evidence shows clearly that only BRT actually picketed, all three union respondents were enjoined, and they will require "accommodation."

to cease performing work for the FEC essential to the regular, day-to-day operations of the FEC.[13]

This conduct of respondents, together with the resistance of the petitioners, presents the factual nexus of a labor dispute, both traditional and well within the scope of Norris-LaGuardia protection. To say, as do petitioners, that this dispute is not a "* * * controversy concerning terms or conditions of employment * * *" 29 U.S.C. § 113(c), is merely to ignore economic reality, which the Court of Appeals below was unwilling to do. This dispute vitally concerns the terms and conditions of employment, not only of the individuals patrolling at the Terminal Company premises, but also of those Terminal Company, Coast Line, and Seaboard employees who exercised their free choice in honoring the requests of their fellow industry and craft employees. See *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry. Co.*, 346 F. 2d 673 (5 Cir. 1965) It does not take the economic acumen of a Keynes to see clearly the vital relationship of this controversy to the terms and conditions of employment of every employee on either side of the picket line.

As characterized by the Court of Appeals, below:

> "In this case the picketing union, allegedly attempting to limit the scope of its appeal to its dispute with FEC, had an obvious interest in putting a stop to the Terminal Company's performing services related to the normal, day-to-day operation of FEC trains—operating with striker replacement crews. A similar interest is present in any case in which a labor group attempts to bring secondary pressure upon the employer with whom its primary dispute exists by means of exerting

[13] See *United Steelworkers* v. *NLRB*, 376 U.S. 492 (1964); *Electrical Workers* v. *NLRB*, 366 U.S. 667 (1961).

primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner—here by providing certain essential services and facilities to the primary employer, FEC.

Turning next to a further examination of the economic interests of the responding employees of the secondary employer-appellees, it should be emphasized that their interests go beyond the "common industrial interest" discussed above. It can be stated unequivocally that Seaboard and FEC are in direct competition for passenger and freight traffic south of West Palm Beach. As far as the ACL and FEC are concerned, the competition, although less direct, cannot be said to be non-existent, especially between Jacksonville and a line drawn from Orlando to the Atlantic Ocean. The significance of this competition lies in the fact that the FEC, by changing work rules and lowering wages, presents a direct threat to the job security of the employees of SAL and ACL. In other words, by operating under such lower than union standards of employment, the FEC enjoys a competitive advantage, which may enable it to increase its share of traffic, vis a vis, ACL and SAL, and, consequently, the latter two railroads could be forced to either (a) lower their standards or (b) lay off a sufficient number of employees to compensate for their reduced traffic share. Accordingly, it is improper to regard the responses of ACL and SAL employees as merely sympathetic." 362 F. 2d at 654-655, R. 48-49.

Respondents respectfully submit that this analysis by the Court of Appeals below is more nearly in accordance with the language and spirit of the Norris-LaGuardia Act, and this Court's prior decisions, than the narrow construction urged by petitioners.

At best petitioners seem to be asking the Court to repeal by judicial construction that portion of the Norris-LaGuardia Act which makes perfectly clear that a labor dispute under the Act may exist, " * * * regardless of whether or not the disputants stand in the proximate relation of employer or employee," 29 U.S.C. § 113 (c). See also, *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365 (1960).

The outline of the development of the "national labor policy" over the past 60 years and the role of the Norris-LaGuardia Act in relation to it are familiar, and have been examined and reexamined by this Court in numerous opinions. See cases cited *infra*, at p. 37. The contentions raised by petitioners as to the inapplicability of the Norris-LaGuardia Act to the present controversy, are not new ones. An expansive view of this Court's function in "accommodating" Norris-LaGuardia to various federal labor and nonlabor legislation has frequently been urged in the past,[14] as have narrow definitional exercises defining participants out of the coverage of Norris-LaGuardia.[15]

Petitioners here offer both versions of the familiar arguments. In light of these contentions some examination of the terms and purposes of the relevant federal legislation is appropriate.

---

[14] Respondents suggested "accommodation" of Norris-LaGuardia to the Interstate Commerce Act in the Court of Appeals below, see R. 50, 362 F.2d at 655, but have apparently abandoned such contention in this Court. See, *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 339, n. 15 (1960).

[15] See, *e.g.*, dissenting opinions, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Lauf* v. *E. G. Skinner & Co.*, 303 U.S. 323 (1938).

Pre-Clayton Act common law concepts of conspiracy in restraint of trade, together with the utilization by the courts of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, *et seq.*, as a weapon against labor activity in such cases as *Loewe* v. *Lawlor,* 208 U.S. 274 (1908) (the "Danbury Hatters" case), need no elaboration.

The labor provisions of the Clayton Act of 1914, 15 U.S.C. § 17, 29 U.S.C. § 52, were, of course, passed as a result of what Congress believed to be unwarranted judicial interference in the economic balance of power and represent the initial, yet still vital, federal statutory recognition of the legality of labor organizational and economic activity.[16] Sections 6 and 20 of the Clayton Act, are clearly relevant to this case and are set out in this brief at pages 1-3.

Section 20 of the Clayton Act describes various forms of labor conduct, which in terms are freed from the ban of federal injunctions. In this statute, however, Congress went further ". . . and also relieved such practices of all illegal taint by the catch-all provision, 'nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.'" *United States* v. *Hutcheson,* 312 U.S. 219, 230 (1941). Congress expressly stated in the Clayton Act that it shall not be a violation "of any law of the United States" peacefully to persuade any person to work or abstain from working, or to cease patronizing a party to a dispute or to withhold services from such party. The public policy of the

[16] See speech by John W. Davis of West Virginia in support of the Wilson Bill (HR 11032, 62nd Cong., 1st Sess.), from which the labor provisions of the Clayton Act were largely taken, 48 Cong. Record 6438, and opposing speech of Mr. Moon of Pennsylvania, 48 Cong. Record 6421.

United States, as here declared, is to leave the worker in this nation "full freedom" for "concerted activities for the purpose of mutual aid or protection."

This public policy, however, was frustrated by a series of judicial decisions limiting the Clayton Act's scope so as not to apply its terms to most labor disputes. The first case to come before the Court involving the construction of Section 20 of the Clayton Act was *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443 (1921). Here the Machinists union sought to organize the only non-union manufacturer among the four national manufacturers of large newspaper printing presses. Since a direct strike against the plant was ineffectual, pressure was exerted upon the company by local unions refusing to repair or work on Duplex presses wherever they were installed or to work for anyone who used them, by appealing to employees of hauling companies not to carry the presses, and various other techniques described by the Court as an attempt to effectuate a 'secondary boycott' of Duplex presses.

The Company filed suit for an injunction under the Sherman Act, and the union relied upon Section 20 of the Clayton Act as a defense to the action.

A majority of the Court held (in a definitional exercise similar to that urged by petitioners herein) that the union conduct was not protected by Section 20 of the Clayton Act in that it was not normal and legitimate activity (as defined by the Court) and the relation of the defendant local unions to the dispute "concerning terms or conditions of employment" was too remote in that the participants did not stand in the proximate relationship of employer and employee.

Justice Brandeis, joined by Justices Holmes and Clarke, dissented in an opinion which has "* * * carried the day in the courts of history as evidenced by subsequent congressional action and decisions of this Court." *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), Goldberg, J., joined by Harlan and Stewart, JJ., concurring at 703. Disagreeing with the majority's narrow reading of the Act, Justice Brandeis emphasized the concept of the economic self-interest of the participants as the touchstone in determining the proximity of their economic relation to the dispute, and, therefore, whether their conduct falls within the scope of the protections of Section 20 of the Act. Justice Brandeis considered the Clayton Act as "* * * declar[ing] the right of industrial combatants to push their struggle to the limits of the justification of self-interest." 256 U.S. at 488.[17]

In 1932 Congress passed the Norris-LaGuardia Act, adopting the views of Justices Brandeis, Holmes, and Clarke.

Examining the opinions of this Court subsequent to the passage of the Norris-LaGuardia Act, it becomes apparent that the essential purpose of that Act was something more than merely to reverse that aspect of *Duplex Printing* which restricted the anti-injunction provisions of Section 20 of the Clayton Act to the immediate employer-employee relationship. Cf. Peti-

---

[17] Additional cases narrowly construing and emasculating Section 20 of the Clayton Act include *Bedford Cut Stone Company* v. *Journeymen Stone Cutters' Ass'n. of North America*, 274 U.S. 37 (1927); *American Steel Foundries* v. *Tri-City Central Trades*, 257 U.S. 184 (1921); *Truax* v. *Corrigan*, 257 U.S. 312 (1921); See generally Frankfurter and Greene, *The Labor Injunction* (1930), pp. 165-191.

tioners Brief at p. 48. While intimated in the holdings of such cases as *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323 (1938), and *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91 (1940), this became plainly evident in the opinion of Mr. Justice Frankfurter for the Court in *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

There the Government urged, as do petitioners herein, that Norris-LaGuardia was only meant to reverse that portion of *Duplex* which dealt with the immediacy of the employer-employee relationship. The Court there rejected such a narrow interpretation:

> "* * * Such legislation must not be read in a spirit of mutilating narrowness, on matters far less vital and far less interrelated, we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. * * *.
>
> "The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. * * * The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Sec. 20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." 312 U.S. at 235-236.

Petitioners say that Mr. Justice Roberts, dissenting in *Hutcheson*, "mischaracterized" the conduct of the

defendant unions there involved, in labeling such conduct as a secondary boycott. Petitioners Brief p. 45. Regardless of the correctness or incorrectness of the label applied, a close reading of the facts in *Hutcheson* demonstrates the applicability of that decision to the present case. There the Carpenters and Machinists unions became involved in a dispute over erecting and dismantling machinery for the Anheuser-Busch Company. Unable to secure the demanded jobs from Anheuser-Busch, the Carpenters struck not only that company and a construction firm doing work on its premises, but also struck and picketed an adjacent employer who leased land from Anheuser-Busch, and a construction company which was erecting a building for the lessee. Presumably the picketing of the adjacent premises was for the purpose of placing additional pressure on Anheuser-Busch in its dispute with the Carpenters. Yet the Court there held that such conduct was not only immune from a federal injunction by reason of Norris-LaGuardia, but also lawful conduct under Section 20 of the Clayton Act.

The *Hutcheson* decision, read together with a series of companion memorandum decisions affirming lower court dismissals of Sherman Act indictments,[18] which

[18] Additional memorandum opinions of the Court, in all of which judgments sustaining demurrers to Sherman Act indictments were affirmed, include: *United States* v. *International Hod Carriers' and Common Laborers' District Council of Chicago*, 313 U.S. 539 (1941), where the defendant organizations threatened and induced strikes on the part of customers' employees to prevent the sale by manufacturers of labor-saving concrete truckmixers in Chicago; *United States* v. *United Brotherhood of Carpenters and Joiners of America*, 313 U.S. 539 (1941), in which defendant A.F.L. unions, subsequent to the certification of a C.I.O. union by the NLRB as exclusive bargaining agent of a lumber firm's employees, took such measures as (a) instigation of strikes by customer's em-

involved various forms of conduct constituting traditional "secondary" activity, compels the conclusion that prior to the passage of the Taft-Hartley Act in 1947, such conduct was not enjoinable under Norris-LaGuardia, and was legal under the Clayton Act.[19]

The Taft-Hartley Labor-Management Relations Act of 1947, in Section 8 (b) (4) of that Act, 29 U.S.C. § 108 (b) (4), of course, added a congeries of provisions declaring certain forms of secondary activity by unions to be violative of the National Labor Relations Act. Such secondary conduct, as therein defined, was made enjoinable by federal courts at the request of the National Labor Relations Board. See 29 U.S.C. §§ 160(h), (j), (l).

As this Court noted in *NLRB* v. *Denver Bldg. & Construction Trades Council,* 341 U.S. 675 (1951), Senator Taft, sponsor of the bill in the Senate and Chairman of the Senate Committee on Labor and Public Welfare, said, in discussing Section 8(b) (4) of the Act: "* * * under the provisions of the Norris-LaGuardia Act, it became impossible to stop a second-

ployees (b) circulation of a blacklist, and (c) refusal to work on "unfair" goods; *United States* v. *Building & Construction Trades Council of New Orleans,* 313 U.S. 539 (1941), in which defendant A.F.L. unions refused to handle materials delivered by C.I.O. represented truckers, although the C.I.O. was NLRB certified and labor contracts had been entered into between the C.I.O. union and the trucking firms.

[19] Petitioners fail to suggest what purpose was embodied in the Taft-Hartley amendments prohibiting certain forms of secondary activity and permitting the National Labor Relations Board to seek injunctions against it, if, as petitioners suggest, such conduct was illegal and enjoinable without reference to those amendments. All the controversy concerning Taft-Hartley becomes meaningless under petitioners' view.

ary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision does is to reverse the effect of the law as to secondary boycotts. * * *" 93 Cong. Rec. 4198.

It was against this background that Justice Frankfurter, again writing for the Court in *Bakery Sales Drivers' Union* v. *Wagshal*, 333 U.S. 437 (1948), discussed the applicability of the Norris-LaGuardia Act to traditional secondary activity, as against a claim of mootness based upon the Taft-Hartley amendments:

> "The short answer to the argument that the Labor-Management Relations Act of 1947, P.L. 101, 80th Cong., 1st Sess., § 10 (h), 29 U.S.C.A. § 160(h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." 333 U.S. at 442.[20]

It would seem safe to assume with the Court of Appeals below, and Mr. Justice Frankfurter, "reputedly the author of the [Norris-LaGuardia] Act, 362 F.2d at 653,[21] and the author of the opinions of

---

[20] Rather than "stating the argument" of one of the parties, as petitioners have suggested (Petitioner's Brief, p. 46), Justice Frankfurter was here answering it.

[21] See Norris, *Fighting Liberal* (1945), pp. 312-313, where Senator Norris wrote concerning the origins of the Norris-LaGuardia Act as follows:

> "I believe it was one of the most comprehensive conscientious investigations a congressional subcommittee has undertaken. I heard every syllable of testimony that was given, and my two loyal and conscientious associates heard nearly all of it. At the completion of the hearings, my associates directed

the Court in *United States* v. *Hutcheson, supra,* and the *Wagshal* case, that the Norris-LaGuardia Act indeed extends to traditional secondary activity.[22]

Marine Cooks & Stewards v. *Panama Steamship Co.,* 362 U.S. 365 (1960), is a later, clearly relevant decision bearing on the existence of a "labor dispute" under the facts of the present controversy. There the owners of a foreign flag vessel sought an injunction against peaceful picketing by a union of the ship in

---

me to summon to our assistance some noted attorneys, who had had long experience with labor legislation and with the trial of labor cases in the courts. The result was that I requested Felix Frankfurter of the Harvard Law School (now a justice of the United States Supreme Court), Donald Richberg of Chicago, Professor Herman Oliphant of Johns Hopkins, Edwin E. Witte, of the University of Wisconsin, and Francis B. Sayre of Harvard to aid in the preparation of the substitute bill; and they all agreed to undertake the labor. I urged them to arrange to come to Washington at the same time, so that they might not only counsel with the subcommittee but also confer and deliberate among themselves.

And then I turned over the Judiciary Committee rooms to these men.

I have always thought that the method of procedure which was adopted was significant. They locked themselves in, and for forty-eight hours gave their undivided attention and study to every court decision bearing upon the rights of organized labor. They reviewed the decisions of the United States Supreme Court with the most scrupulous care, aware that in the great conflict of interest certain to arise from legislation of this character, the constitutionality of the law would be subjected to challenge immediately."

---

[22] See also dissenting opinion of Douglas, J. in *International Union, U.A.W.* v. *Wisconsin Employment Relations Bd.,* 336 U.S. 245, 266, citing a ruling that prior to 1947 the right to engage in a secondary boycott was protected concerted activity under the Wagner Act. *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Co.,* (2 Cir.) 130 F. 2d 503, 505.

American waters, and also against threatened picketing of shore consignees of the ship's cargo should an attempt be made at delivery. The union contended that substandard wages and conditions on foreign flag vessels posed a threat to the livelihood of American seamen.

The Court there held that the controversy was within the Norris-LaGuardia definition, 29 U.S.C. § 113 (c), in that the controversy was one, "concerning terms or conditions of employment," and involved "persons who are engaged in the same industry, craft, trade or occupation." It was immaterial that the union, the ship, *and the consignees* (362 U.S. at 370) did not "stand in the proximate relation of employer and employee," 29 U.S.C. § 113 (c); the case grew out of a labor dispute within the meaning of Norris-LaGuardia.

This inclusion by the Court of the consignees as "persons" and disputants within the meaning of the Act, clearly supports the conclusion of the Court of Appeals below that the present case is substantially similar to, and probably controlled by, *Marine Cooks & Stewards*. The distinction which petitioners seek to draw between that case and the present,[23] (Petitioners' Brief, p. 44) that is, that the union did have a dispute with the vessel concerning the "terms or conditions of employment" on the vessel, substantially undercuts petitioners' plea that they are not disputants as they have no dispute with their own employees, for the Court there made clear that, "There was no labor dispute between the ship's employees and the ship." 362 U.S. at 367.

---

[23] In addition to ignoring the presence of the consignees.

Petitioners' facile argument that they are not "* * * person[s] participating or interested in a labor dispute * * *" as defined in Section 13(b) of the Act, 29 U.S.C. § 113(b), must fail when examined in this light.

Nor does *Columbia River Packers Association* v. *Hinton*, 315 U.S. 143 (1941), cited by petitioners, lend any substance to petitioners' argument in regard to their "non-disputant" status, for there "* * * the controversy [was] altogether between fish sellers and fish buyers. The sellers are not employees of the petitioners or of any other employer nor do they seek to be. On the contrary their desire is to continue to operate as independent businessmen." 315 U.S. at 147.

In this dispute, however, it is patently evident that the employer-employee relationship of the picketing employees to FEC, and the relief which they seek from respondents through their employees, is the matrix of the controversy. As stated by the Court of Appeals for the Fifth Circuit in connection with the litigation engendered by picketing at FEC's southern interchange terminus:

> "* * * it is clear that this case involves or grows out of the labor dispute at FEC and that the Port Authority employees are persons interested in that dispute. The Port Authority employees refused to service the FEC interchange track solely because of the strike and picketing at FEC. This litigation would never have arisen were it not for the labor dispute at FEC. The Authority's employees are interested in the dispute in that they are members of the same trade or industry as the striking FEC workers, see 29 U.S.C.A. § 113 (b), and desire to make common cause with them by honoring their lawful picket line." *Brother-*

hood of Locomotive Firemen and Enginemen v. *Florida East Coast Ry. Co.*, 346 F.2d 673, at 675 (1965).

A number of cases in the lower federal courts have held that the Norris-LaGuardia Act applies in situations like those here involved, where the employees of one common carrier appeal to employees of a connecting carrier not to make deliveries to, or take deliveries from, their struck employer. These cases involve both "common situs" picketing at a jointly used terminal[24] and picketing at interchange points used only by the two carriers involved.

The Court of Appeals for the Eighth Circuit was faced with a case factually similar to the case at bar in *Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees* v. *Dixie Motor Coach Corp.*, 170 F.2d 902 (8 Cir., 1948). Here the owners of a bus terminal sought an injunction against employees of Southern Bus Lines, who were picketing the terminal as a place at which Southern was carrying on its business, in an effort to publicize the dispute and cause Southern's operations to cease. The District Court granted an injunction which was reversed on appeal, the Eighth Circuit holding:

> "The assertion by defendants of a right and intention to publicize their grievances against Southern by peaceful picketing and plaintiff's denial of such right and institution of court action to prevent execution of the intention present a case involving and growing out of a labor dispute in all essentials the same as that upon which the court made its declarations of the law in the Wag-

[24] Here, of course, the terminal is not only jointly used, but jointly owned and controlled, by the struck carrier.

shal case. The brevity of expressions of the Supreme Court to the effect that a case growing out of such boycotting for the labor organization purposes here shown, and plaintiff's resistance to it, is one that grows out of a 'traditional source' of labor disputes within the scope of the Norris-LaGuardia Act implies only that the court considered the law on the question settled beyond need for amplification.

* * * this case to enjoin a secondary boycott threatened in a real and substantial labor dispute over wages and working conditions, grows out of a labor dispute within the scope of the Norris-LaGuardia Act and was and remains subject to the limitations on the court's powers specified in that Act, and . . . the Taft-Hartley Act of 1947 has not changed the law so as to permit issuance of the injunction here granted at the suit of a private party." 170 F.2d at 902, 905.

Another case in point is *Lee Way Motor Freight* v. *Keystone Freight Lines, Inc.,* 126 F.2d 931 (10 Cir., 1942), cert. den., 317 U.S. 645. In that case a common carrier operating pursuant to a certificate of necessity issued by the Interstate Commerce Commission had customarily interchanged freight with connecting common carriers. Like FEC, however, the plaintiff common carrier was engaged in a labor dispute with its own employees. Due to the picket lines put up by plaintiff carrier's striking employees, the employees of the connecting carriers refused to interchange freight with the struck carrier and the normal busines relationship between the struck carrier and the connecting carriers was interrupted. The struck carrier then sued to compel the connecting carriers to continue to interchange freight with it as required by the Interstate Commerce Act, Part II, 49 U.S.C. 301-327. It

was squarely held that an injunction should not be issued because a labor dispute was involved within the meaning of the Norris-LaGuardia Act, 29 U.S.C. 101, *et seq.*

The Court of Appeals for the Fifth Circuit expressly approved the *Lee Way* case in *East Texas Fr. L.* v. *International Brotherhood,* 163 F.2d 10 (5 Cir., 1947), a similar suit by one common carrier against connecting carriers and a union seeking to organize its employees. It was charged that the union's concerted activity, described by the Court as a "boycott," 163 F. 2d at 11, had caused the defendant carriers to refuse "to interline freight with plaintiff" in violation of their duty under acts of Congress. The trial judge there denied the application for injunctive relief, and the Court of Appeals affirmed, citing *Lee Way* as a case directly in point and stating "* * * we are in no doubt that it was well decided." 163 F.2d at 12.

Both the *Lee Way* and the *East Texas Freight Lines* decisions have been cited with approval by this Court in *Order of Railroad Telegraphers* v. *Chicago and N.W.R. Co.,* 362 U.S. 330, 339 (n. 15) (1960). See also *Southeastern Motor Lines* v. *Hoover Truck Co.,* 34 F. Supp. 390 (M. D. Tenn., 1940), cited with approval by the Interstate Commerce Commission in *Montgomery Ward & Co.* v. *Consolidated Freightways,* 42 I.C.C. 225, 235 (1943).

The *Lee Way* and *East Texas Freight Lines* cases, of course, involve suits brought directly by the struck carrier itself, as distinguished from this suit and the *Dixie Motor Coach Corp.* case where the terminal or connecting carrier brought suit. But surely this difference can not be controlling, for Section 13(b), 29 U.S.C.

113(b), of Norris-LaGuardia expressly states that a person shall be deemed a participant and interested in a labor dispute if relief is sought against him (as it clearly is when picketing—at a place where the struck employer is regularly doing business—is addressed to a person providing essential day-to-day services or deliveries to the struck employer) and such person is engaged in the same industry. To hold that all persons affected by picketing of a struck employer can enjoin the picketing, whereas the employer can not, would be to ignore the phrase in Section 13(c) providing that the disputants need not stand in the proximate relation of employer and employee. Such an interpretation would frustrate the very purpose of Norris-LaGuardia to expand the narrow scope given to the Clayton Act in the 1920's.

Respondents submit, therefore, that under any view of their activity, primary or secondary, the Norris-LaGuardia Act is squarely applicable, in terms, to this dispute. (Respondents in no way concede, however, that the picketing here involved would be held to be prohibited secondary activity, even under the provisions of the National Labor Relations Act. 29 U.S.C. § 108(b)(4); see pp. 63-68 of this brief, *infra.*)

II. PETITIONERS' SUGGESTED "ACCOMMODATION" OF THE NORRIS-LAGUARDIA ACT TO THE RAILWAY LABOR ACT IS WITHOUT FOUNDATION IN THE LANGUAGE OR SPIRIT OF EITHER STATUTE

This Court has in the past authorized injunctions in cases arising under the Railway Labor Act, to vindicate the processes of the Act by preserving the jurisdiction of its special agencies, *Brotherhood of R. R. Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957), and to enforce duties made mandatory under the pro-

visions of that act, *Virginian R. Co.* v. *System Federation,* 300 U.S. 515 (1937); *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768 (1952).

What this Court has never done, yet what petitioners urge upon it, is an "accommodation" of the Norris-LaGuardia Act to nothing in the Railway Labor Act, to preserve the jurisdiction of no agency, to compel the performance of no mandatory statutory duty.[25] Petitioners point to no provision in the Railway Labor Act which they purport to require "accommodation," save the general language that the Act seeks to promote "* * * prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," and "to avoid, any interruption to commence * * *". 45 U.S.C. § 2. These references to the purposes of the Railway Labor Act give no aid to petitioners. It is without doubt the purpose of the Railway Labor Act to avoid interruptions to commerce through procedures designed to promote settlement of disputes. But that Act clearly contemplates that there may be such interruptions when the Act's procedures have been exhausted.[26] Here, these procedures have been exhausted. Neither petitioners nor FEC have any matter pending before any Railway Labor Act agency whose jurisdiction requires protection.

In the Railway Labor Act, Congress did not purport to create processes and machinery whereby all disputes

---

[25] Petitioners have taken the precaution of printing the entire Railway Labor Act in the Appendix to their Brief (Petitioner's Brief, pp. 1a-38a). It must be assumed that the reason for such fulsomeness is an inability to point to any particular provision requiring "accommodation."

[26] *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.,* 372 U.S. 284 (1963).

would be settled prior to economic conflict. Save for the area in which compulsory arbitration has been legislated, see *Brotherhood of Railroad Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers* v. *Louisville and N.R. Co.*, 373 U.S. 33 (1963); *Gunther* v. *San Diego and Arizona E. Ry.*, 382 U.S. 257 (1965); where parties have progressed a major dispute through the statutory machinery, self-help and settlement through the interplay of economic force is the legislated scheme. *Brotherhood of Locomotive Engineers* v. *B. & O.R. Co.*, 372 U.S. 284 (1963).

Indeed, this Court has recognized that the Railway Labor Act preserves the right to strike, and that when strikes do occur in the railroad industry they "will typically affect a region or the entire nation." *California* v. *Taylor*, 353 U.S. 553, 566-567 (1957); see also dissenting opinion, Brennan, J., *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195, 225 (1962) ("But there is no general federal anti-strike policy; * * * and if the employer cannot be compelled to arbitrate, restraining the strike would cut deep into the core of Norris-LaGuardia.") Also, the methods used to strike, if peaceful and non-violent, are exclusively a question of federal law, and unless outlawed by Congress, are available as legitimate economic weapons. See *N.L.R.B.* v. *Ins. Agents Int. Union*, 361 U.S. 477, 496 (1960).

There is no intimation in the years since passage of the Norris-LaGuardia Act, that that statute was not meant to apply, in terms, to the conduct of parties who have complied fully with the processes of the Railway Labor Act, who are not in violation of any mandatory statutory duty, and who are exercising their right of self-help.

The Norris-LaGuardia Act has repeatedly and squarely been held by this Court to be applicable in the context of a major dispute under the Railway Labor Act. *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 362 U.S. 330 (1960); *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U.S. 50 (1944). Here, this case grows out of a major dispute between FEC and the BRT. The refusal of petitioners' employees to cross the BRT picket lines is a part of that major dispute. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Florida East Coast Ry. Co.* (5 Cir., 1965), 346 F.2d 673, 676. The sole cause of the petitioners' employees refusal to service the interchange facilities used by the FEC is the major dispute between FEC and BRT which FEC has precipitated by refusing voluntary arbitration when BRT has accepted that way to settle the controversy (R. 142). The petitioners' employees are persons interested and affected by this major dispute as members of the same industry.

In these significant respects this case differs from the decisions involved in *Lakefront Dock & R.T. Co.* v. *International Longshoremen's Ass'n,* 333 F. 2d 549 (6 Cir., 1962), and *Chicago & I.M.R. Co.* v. *Brotherhood of Railroad Trainmen,* 315 F.2d 771 (7 Cir., 1963), vacated as moot, 375 U.S. 18 (1963). In neither of these cases was there a major dispute under the Railway Labor Act involved which had been processed through all the mandatory procedures of the Act. In neither case was the union doing the picketing a railroad union representing railroad employees in a major dispute under the Act. In both cases the labor dispute involved cut across industry lines, i.e., the primary dispute was in the maritime industry and affected the

railroad industry only secondarily. Both suits were brought by railroads against their own employees, not to enjoin the picketing, but to compel them to dishonor the picket lines—a type of relief which the petitioners here expressly eschewed (R. 101-102). Regardless of whether such decisions were decided correctly or not, they do not squarely conflict with the decision of the Court of Appeals in this case or with the decisions cited earlier in *Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees* v. *Dixie Motor Coach Corp.*, supra; *Lee Way Motor Freight* v. *Keystone Freight Lines, Inc.*, supra; and *East Texas Fr. L.* v. *International Brotherhood*, supra.

Likewise, in *Brotherhood of Railroad Trainmen* v. *New York Cent. R. Co.*, 246 F.2d 114 (6 Cir., 1957), cert. den., 355 U.S. 877 (1957), the injunction suit was between a railroad and its own employees. The essential question was whether the dispute involved a lawfully bargainable issue. That court's holding that it did not, and that therefore the case did not involve a "labor dispute" under the Norris-LaGuardia Act, necessarily involved a determination of the legality of the strike itself under the Railway Labor Act, an issue never raised or involved in this case.[27] This Court's

---

[27] Compare in regard to that issue of legality of the strike itself, however, the decision of the Court of Appeals for the Fifth Circuit in *Eastern Air Lines, Inc.* v. *Flight Engineers Internat'l Ass'n*, 340 F.2d 104 (5 Cir., 1965), holding that there is nothing in the Railway Labor Act which itself prohibits self-help in a dispute which can not be fitted into the "major-minor" categories outlined by this Court in *Elgin, J.&E.R.Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945). The Court of Appeals there said (340 F.2d at 106):

> "• • • We think this contention is unsound since there is nothing in the [Railway Labor] Act itself that prohibits self-help except in the two circumstances which have been set out above. Thus, it cannot be said that a strike which is not

later decision in *Order of Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), expressly referred to the *New York Central* case as involving a similar question to the one there involved, 362 U.S. at 334-335 (n. 4), and resolved that question contrary to the result reached by the Court of Appeals for the Sixth Circuit. The *New York Central* case can not be regarded as authority for accommodating the Norris-LaGuardia Act so as not to apply its terms in the context of a lawful strike arising out of a major dispute processed through the Act's procedures.

Surely petitioners' argument in this case represents the boldest plea ever to be suggested to this Court for "* * * judicial obliteration of [the Norris-LaGuardia] Act under the soft euphemism of 'accommodation' * * *" *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 209 (1962).

What, in effect, is asserted by petitioners is simply that this Court should declare as a matter of national policy that strikes in the railroad industry are so harmful to the public that railway labor should be prohibited from interferring in any way with a struck carrier's interchange with connecting carriers. This is not the balance of economic power that Congress legislated, and is plainly an attack on this Court's holding in *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, supra, 362 U.S. at 339, that Norris-LaGuardia is not to be accommodated to other non-labor statutes, e.g., the Interstate Commerce Act.

---

in support of the position being maintained by the striking employees in either a minor or major dispute, as the case may be, is prohibited by the terms of the Act."

The two circumstances referred to are a strike over a minor dispute or a strike over a major dispute that has not been processed through the procedures of the Act. Neither is here involved.

As this Court further said in *Sinclair Refining,* Congress did not intend "* * * to confer a power upon the courts to accommodate that Act [Norris-LaGuardia] out of existence" 370 U.S. at 209. Here, as in *Sinclair,* petitioners are seeking an injunction against the very types of concerted action specifically described in Norris-LaGuardia. See Section 4, 29 U.S.C. 104. Unlike *Sinclair,* however, there is not even the balm of arbitration offered here in lieu of the concerted action sought to be enjoined.

The gist of petitioners' logic in their suggested "accommodation" argument is that the term "labor dispute" in Norris-LaGuardia should be limited to the definitions of "major" or "minor" disputes under the Railway Labor Act. This dispute, they say, is neither. Therefore Norris-LaGuardia does not apply. This approach simply ignores the plain fact that there *is* a major dispute between BRT and FEC, that FEC does operate daily and regularly at all places picketed by the BRT, and that respondents have not sought to interfere with petitioners' operations except insofar as they involve the FEC. The evidence concerning the Coast Line's Dennis Street crossing here becomes highly significant (see petitioners' brief, pp. 8-10), and the fact that respondents did *not* picket the crossing there as petitioners claim (see pp. 20-21 of this brief, supra) demonstrates the obvious fact that the picketing here arises directly out of the FEC-BRT major dispute.

But even if, by use of arbitrary labels, the dispute here is called neither "major" nor "minor", it does not follow that it is not a labor dispute under both Norris-LaGuardia and the Railway Labor Act. The definition of "labor dispute" Congress used in Norris-

LaGuardia is simply not the same definition attributed to Congress with respect to a "major" and "minor" dispute in the Railway Labor Act. To say that "it ought to be" is like saying "there ought to be a law against it." See *N.L.R.B.* v. *Ins. Agents Int. Union,* supra, 361 U.S. at 496 (n. 25). Moreover, Section 5 of the Railway Labor Act expressly provides as follows:

> "Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> "(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> "(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> "The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> "* * *
>
> "* * *."
>
> (45 U.S.C. 155, First.)

Obviously category (b) contemplates that there can be "labor disputes" under the Railway Labor Act that are not either "major" or "minor" disputes as those terms are defined in the Act. While National Mediation Board jurisdiction in such cases is not mandatory, it certainly is not out-lawed. As respondents earlier suggested in this case in June, there are alternatives open to petitioners under the Railway Labor Act (e.g.,

Section 10, 45 U.S.C. 160), and otherwise,[28] besides involving the federal courts in the business of issuing labor injunctions.

The colloquy between Congressmen Lankford and LaGuardia cited by petitioners as the legislative history in support of their "accommodation" (pages 26-27, Petitioners' Brief) would, standing alone, seem to indicate that Norris-LaGuardia does not apply to Railway Labor Act controversies at all. Obviously, this is not the case. *Brotherhood of Railroad Trainmen* v. *Toledo, P. and W. R. Co., supra; Order of Railroad Telegraphers* v. *Chicago and N. W. R. Co., supra.* The Congress which passed the Norris-LaGuardia Act was acutely aware of its applicability to railway labor controversies, to the extent that an amendment to the Act expressely exempting railroads and public utilities from the Act's protections was debated and soundly defeated. See 75 Cong. Rec. 5503-5505 (1932).

Railway labor disputes were mentioned repeatedly in Congressional debate, with particular emphasis upon the abuses by the federal courts of their injunctive powers during the shopcraft strike of 1922. E.g., 75 Cong. Rec. 4618-4620 (1932).

There is no intimation whatever, that Congress intended that its definition of what constitutes a "labor dispute" for the purposes of the Norris-LaGuardia Act was to be radically limited in the context of a

---

[28] Respondents discussion in the briefs filed with this Court in June of possible means available to petitioners under the Interstate Commerce Act to relieve the impact of the FEC-BRT major dispute on them has been seized upon by petitioners as showing that the purpose of the BRT picketing is to force petitioners to embargo the FEC. Respectfully, respondents suggest that this is an obvious case of setting up and knocking down a straw man. Respondents' discussion at that time was directed entirely to the existence vel non of an emergency warranting this Court's granting of extraordinary relief.

railway "labor dispute." Respondents respectfully submit that, in our judgment, petitioners are simply urging the Court to repeal the Norris-LaGuardia provisions that, "The term 'labor dispute' includes *any controversy concerning terms or conditions of employment • • • regardless of whether or not the disputants stand in the proximate relation of employer and employee,*" 29 U.S.C. 113(c) (emphasis added), and that, "A person shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, • • •." 29 U.S.C. 113(b).

Against the background of the particular dispute here involved, such a repeal by "accommodation" would result, and has resulted to the present, in the right of self-help being virtually unilateral to the carrier.[39] This tampering with the economic balance of power legislated by Congress has resulted in the pro-

[39] Provision in the injunction that picketing is permitted at the employee entrance to the Terminal Company allegedly "reserved" for FEC employees is nothing more than token recognition of the employees' right to self-help. Not only is the gate not used by anybody, but limitation of the BRT's appeal to those who are breaking the strike, with no provision for appeals to the public and to neutral or "allied" employees, not to make deliveries or to provide essential day-to-day services for FEC, amounts, in fact, to a ban on picketing. *See American Federation of Labor* v. *Swing*, 312 U.S. 321, 326 (1941), where this Court held:

> "A state cannot exclude working men from peaceful exercise of the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become commonplace. • • • The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

longation and exacerbation of the major labor dispute here involved. It has relieved the struck carrier of legitimate pressure to the extent that the FEC's duty to exert every reasonable effort to settle all disputes in order to avoid interruption to "the operation of *any* carrier growing out of any dispute between *the* carrier and the employees thereof," Section 2, First, Railway Labor Act, 45 U.S.C. 152, First (emphasis added), has become an empty formality.[30]

III. THE DISTRICT COURT LACKED JURISDICTION BECAUSE THE CONDUCT ENJOINED IS ARGUABLY SUBJECT TO THE EXCLUSIVE PRIMARY JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

An additional, wholly separate ground upon which to sustain the decision of the Court of Appeals below that the District Court lacked jurisdiction to enter the labor injunction here involved, is the applicability of the "preemption" doctrine as enunciated by this Court, to the facts of this case.[31]

---

[30] As Secretary of Labor Wirtz has advised the Chairman of the Florida Railroad and Public Utilities Commission by letter of April 11, 1963, "It is apparent that it is Mr. Ball, and he alone, who controls the ultimate decision making responsibility for the carrier and his present reluctance to accept our recommendation for arbitration or have top level discussions here in Washington presents a serious hinderance to an early resolution of the dispute."

[31] This point is also involved in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Company*, No. 244, O.T. 1966, involving a companion suit to this case wherein the petitioner, Jacksonville Terminal Company after the Court of Appeals ruled in this case, sought and obtained a state court injunction against the picketing here involved. Respondents sought to remove the state court proceedings to the District Court below, but the Terminal Company asserted to the District Court that it was "axiomatic" that the Norris-LaGuardia Act divested the District Court of jurisdiction, and the District Court remanded the case to the state court where a preliminary injunction against the picketing was rendered May 30, 1966, and a final injunction, which is being appealed, on July 29, 1966.

At least since *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953), and clearly since *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), this Court has consistently and repeatedly ruled that state and federal courts lack jurisdiction to adjudicate the legality of peaceful, orderly picketing which is "arguably subject" to the protections or prohibitions of the Labor Management Relations Act, 29 U.S.C. § 141 et seq. The Courts in such cases lack even the jurisdiction to decide the jurisdictional question prior to an NLRB ruling. *Marine Eng. Ben. Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962); *Hanna Mining Co.* v. *Marine Eng. Ben. Ass'n*, — U.S. —, 86 S.Ct. 327 (1965).

The fundamental basis underlying this doctrine of preemption is that Congress has vested an administrative agency, the National Labor Relations Board (NLRB), which presumably enjoys some expertise in the field, with the exclusive, primary power to make the determination of whether a matter does fall within its area of special competency or not. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959).

> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board * * *." *Id.* at 245.

A situation such as the present seldom arises in the federal system for the Labor Management Relations Act (LMRA) makes perfectly clear that an injunction against secondary activity allegedly in violation of Section 8(b)(4), 29 U.S.C. § 158(b)(4), may be obtained only at the request of the NLRB. 29 U.S.C.

§ 160(j), (L). Where questions arise as to the jurisdiction of the Board, employers are far more prone to seek their labor injunctions in the state courts rather than to face the jurisdictional bar of the Norris-LaGuardia Act in a federal court.

Nevertheless, by creating the statutory machinery of the LMRA, Congress divested *all* courts, both state and federal, of their function to serve as primary tribunals to adjudicate the issue of jurisdiction itself. The reason for such withdrawal of jurisdiction is obvious. If the multitude of trial courts, state and federal, are simultaneously deciding jurisdictional issues in labor cases along with the NLRB its role as a specialized agency shaping the initial course of administration of federal labor law would be literally submerged and destroyed. See *Capital Service* v. *N.L.R.B.*, 347 U.S. 501 (1954); compare *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U.S. 511 (1955).

That the conduct which the District Court below enjoined is "arguably subject" to the NLRB's jurisdiction is easily illustrated. Respondents are accused of engaging in an illegal secondary (but peaceful) boycott. The NLRB clearly has "arguable" jurisdiction over this type of conduct [§ 8(b)(4), 29 U.S.C. 158(b)(4)], unless some other circumstance present in the case makes it clear beyond doubt that it does not.

Petitioners contend that simply because the definitional sections of the LMRA exclude employers subject to the Railway Labor Act and their employees from the definitions of "employer" and "employee", §§ 2(2) and 2(3), 29 U.S.C. §§ 152(2), (3), it is not arguable that respondents' conduct, albeit allegedly

an illegal secondary boycott, is subject to regulation under the LMRA. See Petitioners' Brief, at pp. 53-55.

We could well wish that petitioners' argument in this respect were well founded. Unfortunately, we are confronted by the decision in the recent case of *International Brotherhood of Electrical Workers, AFL-CIO* v. *NLRB*, 350 F. 2d 791 (D.C. Cir. 1965), cert. denied, March 21, 1966, 86 S.Ct. 1196, which effectively foreclosed the right to picket at another of FEC's important terminals. In that case railroad unions representing striking employees of the Florida East Coast Railway were found to be covered by NLRB jurisdiction despite their vigorous protest that the LMRA had no application whatsoever to their conduct in representing railroad employees. Certain of the unions there involved represented only railroad employees in their activities throughout the nation; others represented both railroad employees and non-railroad employees.[32] The unions contended without success that they should be treated as Railway Labor Act organizations when representing railroad employees and as LMRA labor organizations when representing non-railroad employees. Cf. *Pan American World Airways, Inc.* v. *United Bro. of Carpenters & Joiners*, 324 F. 2d 217 (9th Cir. 1963), holding that the status of an airline company as an employer under the Railway Labor Act or the LMRA

[32] Insofar as the status of two of respondents is concerned, see *Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen and Phelps Dodge Corp.*, 130 NLRB No. 94, 47 LRRM 1461 (1961). In the companion state court suit referred to in footnote #31, supra, the Terminal Company stipulated that while the membership of respondents is overwhelmingly composed of employees under the Railway Labor Act (i.e., over 93% in each instance), each respondent does also represent employees who are not covered by the Railway Labor Act. For example, the BRT represents many bus company employees.

depends upon what functions the employer is actually doing in the specific instance involved. See also *Local Union No. 25* v. *New York, New Haven and H. R. Co.*, 350 U.S. 155 (1956); *United Steelworkers* v. *NLRB*, 376 U.S. 492, 500-501 (1964).

It can be seen from these cases that the question of coverage of the LMRA, when it turns upon the status of either the employer or of the labor organization involved, can be an intricate and difficult one by any standards. Therefore, this Court has squarely held that, where the question of LMRA coverage does turn on status, a state or federal court is preempted of jurisdiction to make that determination, and exclusive primary jurisdiction to make the initial decision on the question rests with the administrative agency, the NLRB. *Marine Eng. Ben. Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962).

Respondents respectfully submit that the foregoing cases clearly show that the question of NLRB jurisdiction over the conduct here involved is an "arguable" one, and that therefore the District Court below lacked jurisdiction.[33]

---

[33] While it should again be emphasized that respondents' position on the merits of LMRA jurisdiction has been and is that the Railway Labor Act, the Clayton Act, and the Norris-LaGuardia Act govern the legality vel non of their conduct to the exclusion of both state law and the LMRA, the fact that respondents take this position does not serve either to grant or divest the NLRB of jurisdiction or to make the matter of its jurisdiction any more or less "arguable." Likewise, the fact that petitioners do not here and now choose to invoke or assert NLRB jurisdiction does not make the matter less "arguable." Jurisdiction of that agency is not determined by the desires of the parties.

IV. RESPONDENTS' CONDUCT HEREIN IS OUTLAWED BY NO FEDERAL STATUTE AND IS EXPRESSLY LEGALIZED BY SECTION 20 OF THE CLAYTON ACT

A. Clayton Act Applicable to Respondents' Activity

In their discussion regarding the legality of respondents' conduct, petitioners choose to ignore the provisions of Sections 6 and 20 of the Clayton Act, *supra*. Rather they seek to have this Court fill a purported "statutory gap" relating to rail labor controversies, with judicial regulation, presumably coextensive with Congressional action in Section 8 (b)(4) of the Labor Management Relations Act.[35] Disregarding the patently legislative nature of such "gap" filling, in fact no such "gap" exists.

The protections afforded by the Clayton Act to "* * * the immunized trade union activities as redefined by the later [Norris-LaGuardia] Act * * *", *United States* v. *Hutcheson, supra*, 312 U.S. at 236, are fully applicable to respondents' conduct herein viewed from any standpoint, i.e., primary or secondary. (See discussion of legality of secondary activity, *supra* at pp. 36-43.) The Clayton Act has never been repealed (save for a period of judicial limitation) and remains, where applicable, as a strong *and legislative* expression of the "national labor policy".

---

[35] Of course, under the all-inclusive language of § 8(b)(4) of the LMRA, which this Court has noted literally bans "most strikes historically considered to be lawful, so-called primary activity" (*Electrical Workers* v. *NLRB*, 366 U.S. 667, 672 (1961)), fine distinctions have been spun involving the tenuous difference between mere "hope" and "intent". 366 U.S. at 673-674. The constitutionality of § 8(b)(4), if literally applied, would (we submit) present serious questions under the First Amendment. Defining the line between "hopes to achieve the forbidden objectives", conceded to be universal, and an intent to achieve it, may be the only alternative to facing these difficult constitutional questions.

It can hardly be accepted that a "huge gap" requiring some form of judicial regulation exists, where one of the great labor statutes of this century is fully applicable to protect respondents' conduct, under any view, from the taint of being a violation of any law of the United States.

B. Respondents' Activity Not Prohibited Even Under NLRB Standards

One of petitioners' assertions as to the illegality of respondents' picketing is that the picketing is so clearly secondary in nature as to offend "general federal labor policy." The idea of "secondary" conduct, without reference to a particular statutory enactment, however, is so vague that even petitioners shy away from any definition of the term. (Pet. Br. p. 42, fn. 1) Significantly, Congress has never used the term in any of the many labor laws it has passed.

The railroad yards which were picketed, are yards where FEC trains and crews operate. In these yards over 31% of the freight handled is FEC freight. It is the place where employees of connecting carriers come in contact with FEC operations, where they deliver cars to FEC to be removed by FEC engines and crews, where they maintain trackage over which FEC operates and throw switches and give signals for FEC train movements, and where they render various other direct services for FEC. The picketing of these FEC operations and the appeal by respondents to their fellow railroad workers not to render services to FEC was made at the closest public locations to these operations.

To call this picketing "secondary" under any definition would be simply to say that the picketing has severe secondary consequences to others. But all

picketing has "secondary" aspects. See *NLRB* v. *International Rice Mill Co.*, 341 U.S. 665 (1951). To make the policy judgment that the picketing should be prohibited would be a legislative judgment that would by the nature of railroad operations insulate from picketing the most economically important part of its operations by which it receives freight from other carriers, because of the interruption to the operations of the connecting carriers.

Petitioners say that the FEC operations on the Jacksonville Terminal premises are "a very small—and severable—tail [of] a very large dog." Regardless of the fact that the petitioners' hypothetical dog is of a most remarkable breed whose tail is 30% of its total bulk, the question is the severability of FEC operations from the other operations carried on at the Terminal. There is some degree of severability and respondents did not picket rail entrances to the Terminal Company premises used by rail movements unrelated to FEC.

But for the injunction issued within hours after the picketing began, further arrangements could have been made to limit the effects of the picketing. For instance, certain tracks could have been designated by the Terminal Company solely for FEC movements and other tracks designated solely for the use of the other carriers. Interchange freight not destined for FEC could have been segregated and brought on to the Terminal Company premises in separate rail movements. The Terminal Company could have permitted the pickets to come onto its premises to picket the actual places within the Terminal Company premises where FEC interchange and other FEC work is performed.

Petitioners' argument assumes that it is they, and they alone, who are picketed. Just as forcefully respondents could argue that it is the FEC, and the FEC alone, that is picketed. We submit that the reality is that it is the physical business connection between petitioners and FEC which is being picketed. In short this is simply a "common situs" or mobile situs situation. As to such a problem, which admittedly can be difficult, Congress in its wisdom has provided one special rule even within the confines of the LMRA for the garment industry (see Section 8(e), LMRA, 29 U.S.C. 158(e)) and is currently debating a proposal to make special rules for the construction industry. Is this Court equipped to make such determinations? The variety of solutions available is wide. All common situs picketing can be banned. All such picketing can be protected. Ownership of the common situs can be made the determinative factor, or control. The nature of the duties performed by the secondary employees affected can be made the crucial point. What is a good rule for one industry may not be practical or realistic for another. All that respondents contend is that consideration and determination of all these factors and alternatives is truly legislative in character and ought to be left to Congress. And Congress has not, for the railroad industry, seen fit to outlaw secondary activity of any sort, but rather has legalized such activity by Section 20 of the Clayton Act and the Norris-LaGuardia Act.

Although it seems quite clear that Congress intended to regulate railway labor in a different manner from its regulation of other industry, respondents believe that their picketing here involved would constitute protected, primary picketing under the National Labor Relations Act.

A recent decision of this Court squarely in point is *United Steelworkers* v. *N.L.R.B.* (1964), 376 U.S. 492, 84 S.Ct. 899. In that case the Steelworkers had struck the Carrier Company and had picketed a railroad spur leading to the Carrier Company plant. The picketing was on railroad property, was an appeal to the railroad crews, and was done for the purpose of inducing the railroad to cease providing rail service to the Carrier Company for the duration of the strike. 376 U.S. at 496. This picketing was held to be primary and legal picketing under the N.L.R.A.

The Court of Appeals there had held the picketing to be secondary and illegal because it was an appeal to neutrals not to do business with the struck employer. This Court held that primary picketing is *not* limited to an appeal to employees of the struck employer but also includes an appeal to those neutral employees making deliveries to the struck employer (or receiving deliveries from the struck employer) or performing services which aid the struck employer's day-to-day operations.

This Court also held that picketing upon the premises of the neutral was permissible if "there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier." 376 U.S. at 499.

If picketing of rail deliveries to a struck plant is primary activity, *a fortiori* the picketing of rail deliveries by one railroad to another is primary activity in a railroad labor major dispute.

In addition there has developed under the National abor Relations Act decisions a doctrine often called ie "ally" doctrine. Under this doctrine picketing of ie "ally" itself is primary picketing if the nexus be- veen the ally and the primary employer is sufficiently ose. Perhaps the first case which applied these prin- ples was *Douds* v. *Metropolitan Federation of Archi- cts,* 75 F. Supp. 672 (D.C., S.D., N.Y., 1948). There ie relationship between the primary employer and the ly antedated the strike. They were separate busi- ess entities. The Court held that because the ally as doing for the primary employer the same type of ork as was normally performed by the primary em- loyer, it was subject to being picketed. The fact iat the particular relationship was common in that idustry was held to be of no consequence. Most sig- ificantly, Senator Robert Taft stated that this de- sion was a correct interpretation of the Taft-Hartley mendments to the National Labor Relations Act. See 95 Congressional Record 8709, 1949).

Surely the Jacksonville Terminal Company which is vned and controlled in part by FEC, which is an tegral part of the FEC system, which is a place here FEC trains and crews daily operate, and which doing "struck work" is such an "ally". Other pplicable decisions under the ally doctrine are: .L.R.B. v. *Electrical Workers, CIO,* 228 F. 2d 553 C.A. 2, 1955) cert. den. 351 U.S. 962 (1956); *N.L.- .B.* v. *Local 459, Electrical Workers,* 289 F. 2d 62 C.A. 2, 1961); *Masters, Mates & Pilots and Ingram arge Co.,* 136 N.L.R.B. No. 112, 49 L.R.R.M. 1943 1962).

C. Respondents' Activity Not Violative of Interstate Commerce Act

The petitioners' allegation that respondents' conduct is unlawful under the Interstate Commerce Act is based upon several erroneous assumptions: (1) that the duty of one carrier to interchange with another is virtually absolute, (2) that the FEC is entitled to enforce the interchange provisions of the Interstate Commerce Act against petitioners by mandatory injunction, and (3) that respondents' conduct is unprotected for unspecified reasons by the provisions of Sections 6 and 20 of the Clayton Act.

Relying upon the interchange provisions, Sections 1(4) and 3(4) of the Interstate Commerce Act, District Court authority from the last century, and several more recent District Court decisions, petitioners claim that neither a strike nor picketing of a connecting carrier relieves other carriers from the duty of performing interchange and that therefore, respondents' conduct herein, interfering with such interchange, is an unlawful interference with interstate commerce. Petitioners' Brief pp. 60-61.

The Interstate Commerce Commission has taken a different view of the duties of connecting carriers. The Commission, whose interpretation of its own organic statute is entitled to great weight (*United States* v. *American Trucking Ass'ns* (1940), 310 U.S. 534, 549), held in *Montgomery Ward & Co.* v. *Consolidated Freightways, Inc.*, 42 I.C.C. 225 (1943), that the motor carriers there involved had not violated the Interstate Commerce Act by their failure to serve complainant Montgomery Ward, while Ward was being picketed by its striking employees. The Commission

noted that the union striking Ward was the same one representing the motor carriers' employees (42 I.C.C. at 227), and that the carriers' employees refused to cross the picket line at Ward's plant. In this regard the Commission stated:

> "* * * A common carrier's duty to receive and transport therefore is not an absolute one, but is subject to reasonable limitations and conditions. It may refuse to receive property for shipment if transportation on its line or the line of a connecting carrier has become impossible or impracticable because of circumstances beyond its control, as for example, a strike, the strike not being induced or caused by the carrier. *Gage* v. *Arkansas Cent. R. Co.*, (160 Ark. 402) 254 S.W. 665. In that case, the refusal of the defendant carrier to receive a shipment destined to a point on the line of a connecting carrier which had declared an embargo at the destination because of a switchmen's strike at that point was upheld. See also *Galveston, H. & S. Ry. Co.* v. *Karrer*, 109 S.W. 440.
>
> "We find that the defendants' failure to serve the complainant as herein described was proximately caused by a strike at complainant's plant, for which the defendants were not responsible, and that because of the said strike they were physically prevented from serving the complainant, and accordingly their conduct was within the limitations and conditions of the applicable tariff with respect to impractical operation, and not unlawful. The complaints will be dismissed."[36] (emphasis added) 42 I.C.C. at 231, 237.

[36] The same controversy involved before the Interstate Commerce Commission in *Montgomery Ward* v. *Consolidated Freightways, Inc., supra*, came on before a District Court in *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.* (D. Ore. 1953), 128 F. Supp. 475, supplemental decision, 128 F. Supp. 520. In this case, adjudicated some ten years after the events involved, liability was imposed upon common carriers for their failure to serve a struck

Obviously both the approach and holding of the Interstate Commerce Commission in regard to the duties and liabilities of a common carrier faced with strike conditions not of its own making are markedly different from those which the petitioners contend are their duties and liabilities herein.

But regardless of Interstate Commerce Act obligations, the legality of respondents' labor activities is not governed thereby, but rather by federal labor legislation, and in this regard the Clayton Act, which is totally ignored in petitioners' argument on the merits (pp. 50-64), establishes that respondents' interference with interchange between FEC and petitioners is fully justified by respondents' economic self-interest. As stated by Justice Brandeis in dissent in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 448 (1921):

> "Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the

---

shipper being picketed by its striking employees. The decision, however, does not directly pass upon the issue here presented, for there Judge Fee significantly found that there was no "unity of interest" between the railroad transportation employees who honored the picket lines and the striking employees of Montgomery Ward (128 F. Supp. at 508, 487, 522). In this latter regard, although noting that the "• • • unions are not present in court to protect themselves" (128 F. Supp. at 506), the District Court ruled that the railroad employees "• • • were neither in the same business, type of business or connected concern with Wards or its employees, nor did they belong to the same or any affiliated union or group of unions with the strikers or the union leaders controlling the strike, the boycott and the picketing." (128 F. Supp. at 487). Accordingly, under these circumstances, Judge Fee rejected the labor dispute between Ward and its employees as a sufficient excuse for the carriers' failure to perform what he described as their "absolute" (128 F. Supp. at 490, 500, 511) obligation.

justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purpose of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

SCHOENE & KRAMER
Washington, D. C.

LESTER P. SCHOENE
1625 K Street, N. W.
Washington, D. C.

RUTLEDGE & MILLEDGE
Miami, Florida

NEAL RUTLEDGE
ALLAN MILLEDGE
RICHARD L. HORN
601 Flagler Federal Bldg.
111 N.E. First Street
Miami, Florida 33132

BECKHAM & MCALILEY
Miami, Florida

THOMAS W. MCALILEY
1010 Concord Bldg.
63 West Flagler Street
Miami, Florida 33130

September, 1966